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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Question of the impunity of perpetrators of human rights violations (civil and political)

Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119

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INTRODUCTION

A. Origins of the campaign against impunity

1. At its forty-third session (August 1991), the Sub-Commission requested the author of this report to undertake a study on the impunity of perpetrators of human rights violations. Over the years, that study has revealed that the process by which the international community has become aware of the imperative need to combat impunity has passed through four stages.

First stage

2. During the 1970s, non-governmental organizations, human rights advocates and legal experts and, in some countries, the democratic opposition - when able to state its views - mobilized to argue for an amnesty for political prisoners. This was typical in Latin American countries then under dictatorial regimes. Among the pioneers were the Amnesty Committees in Brazil, the International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) and the Secretariat for Amnesty and Democracy in Paraguay (SIJADEP). Amnesty, as a symbol of freedom, would prove to be a topic that could mobilize large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes.

Second stage

3. This stage occurred in the 1980s. Amnesty, the symbol of freedom, was more and more seen as a kind of "down-payment on impunity" with the emergence, then proliferation, of "self-amnesty" laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time. This provoked a strong reaction from victims, who built up their organizational capacity to ensure that "justice was done", as would be shown in Latin America by the increasing prominence of the Mothers of the Plaza de Mayo, followed by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM) which later fanned out onto other continents.

Third stage

4. With the end of the cold war symbolized by the fall of the Berlin Wall, this period was marked by many processes of democratization or return to democracy along with peace agreements putting an end to internal armed conflicts. Whether in the course of national dialogue or peace negotiations, the question of impunity constantly cropped up between parties seeking to strike an unattainable balance between the former oppressors' desire for everything to be forgotten and the victims' quest for justice.

Fourth stage

5. This was when the international community realized the importance of combating impunity. The Inter-American Court of Human Rights, for example, in a ground-breaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to

a fair hearing before an impartial and independent court. The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, entitled "Vienna Declaration and Programme of Action" (A/CONF.157/24, Part II, para. 91).

6. This report therefore comes under the general heading of the Vienna Programme of Action. It recommends adoption by the United Nations General Assembly of a set of principles for the protection and promotion of human rights through action to combat impunity.

B. Background of the study

7. The better to understand the final stage of the study, it must be shown how this report fits into the work of the Sub-Commission.

8. Thirty-eighth session (August 1985). Presentation by Mr. Joinet, in his capacity as Special Rapporteur on amnesty, of a final report entitled "Study on amnesty laws and their role in the safeguard and promotion of human rights" (E/CN.4/Sub.2/1985/16/Rev.1). The present report draws in part on chapter III of that study.

9. Forty-third session (August 1991). In its decision 1991/110, the Sub-Commission asked two of its members, Mr. El Hadji Guissé and Mr. Louis Joinet, to draft a working paper on the approaches that a study on impunity might take.

10. Forty-fourth session (August 1992). Following the submission of the working paper (E/CN.4/Sub.2/1992/18), the Sub-Commission decided, by its resolution 1992/23, to request the co-authors to draft a study on the impunity of perpetrators of violations of human rights. The Commission on Human Rights (in resolution 1993/43) and the Economic and Social Council (in decision 1993/266) approved this action.

11. Forty-fifth session (August 1993). Upon presentation of the preliminary report - and not the "progress" report as erroneously indicated (E/CN.4/Sub.2/1993/6) - the Sub-Commission requested the co-authors to extend their study to serious violations of economic, social and cultural rights.

12. Forty-sixth session (August 1994). After welcoming the preliminary report on the impunity of perpetrators of human rights violations (economic, social and cultural rights) (E/CN.4/Sub.2/1994/11 and Corr. 1), the Sub-Commission decided (resolution 1994/34) to split the study in two, entrusting Mr. Joinet with the aspect of civil and political rights and Mr. El Hadji Guissé with that of economic, social and cultural rights.

13. Forty-seventh session (August 1995). Through its resolution 1995/35, the Sub-Commission welcomed with satisfaction the progress report by Mr. Joinet (E/CN.4/Sub.2/1995/18), which contained a summary of comments on certain matters of principle, and requested him to submit his final report in August 1996, at its forty-eighth session.

14. Forty-eighth session (August 1996). Lacking the time to consider the report, the Sub-Commission requested the Special Rapporteur

(decision 1996/119) to submit to it at its forty-ninth session a final version, revised and extended, incorporating a revised version of the set of principles for the protection and promotion of human rights through action to combat impunity.

15. Forty-ninth session (August 1997). This final report is submitted to the Sub-Commission at its present session in accordance with the above-mentioned decision.

I. OVERALL PRESENTATION OF THE SET OF PRINCIPLES

16. The following three sections summarize the overall presentation of the set of principles and their justification in reference to victims' rights:

(a) The victims' right to know;

(b) The victims' right to justice; and

(c) The victims' right to reparations.

A. The right to know

17. This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember" on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.

18. Two series of measures are proposed for this purpose. The first is to establish - promptly in principle - extrajudicial commissions of inquiry, for - unless handing down summary justice, which has too often been the case over history - the courts cannot quickly punish executioners and those who give them their orders. The second is to preserve archives relating to human rights violations.

1. Extrajudicial commissions of inquiry

19. These have two main aims: first, to dismantle the machinery which has led to aberrant behaviour becoming almost administrative practice, in order to ensure it does not recur; second, to preserve evidence for the judiciary but also to establish that what oppressors often denounced as lies, in order to discredit human rights advocates, all too often fell short of the truth, and thus to give those advocates back their good name.

20. Experience shows that care must be taken not to allow these commissions to be sidetracked or furnish a pretext for not going before the courts. Hence the idea of suggesting basic principles, derived from a comparative analysis of past and present commissions' experience, which commissions must honour or lose credibility. These principles relate to four main areas, discussed below.

(a) Guaranteed independence and impartiality

21. The extrajudicial commissions of inquiry should be set up by law, by act of general application or by agreement in the context of a transitional arrangement or peace accord. Their members should not be subject to dismissal during their terms of office: they must be protected by immunity and, if necessary, be able to seek police assistance. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the justice system but at most to help to safeguard evidence. Commissions' credibility should also be backed up by adequate financial and personnel resources.

(b) Safeguards for witnesses and victims

22. Testimony should be taken from witnesses and victims only on a voluntary basis. As a safety precaution, anonymity may be permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a commission member must be empowered to examine the grounds for the request of anonymity and, confidentially, ascertain the witness's identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

(c) Guarantees for persons implicated

23. If the commission is permitted to divulge their names, the persons implicated must either have been given a hearing or at least summoned to do so, or must be able to exercise a right of reply in writing, the reply then being included in the file.

(d) Publicity for the commissions' reports

24. While there may be reasons to keep the commissions' proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicized as widely as possible. Commission members must enjoy immunity from prosecution for defamation.

2. Preserving archives relating to human rights violations

25. The right to know implies that archives must be preserved. The steps required for this purpose are:

(a) Protective measures and moves to punish the destruction or concealment of, or illicit traffic (black market) in, archives;

(b) Creation of an inventory of archives including, with the cooperation of the countries concerned, archives maintained by third countries;

(c) Adaptation of the regulations governing access to and consultation of archives to changed circumstances, among other things by allowing anyone they implicate to add a right of reply to the file.

B. The right to justice

1. The right to a fair and effective remedy

26. This implies that any victim can assert his rights and receive a fair and effective remedy, including seeing that his oppressor stands trial and obtaining reparations. There can be no just and lasting reconciliation without an effective response to the need for justice; as a factor in reconciliation, forgiveness, a private act, implies that the victim must know the perpetrator of the violations and that the latter has been able to show repentance. If forgiveness is to be granted, it must first have been sought.

27. The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is principally one for the State to take, supplementary procedural rules should allow any victim to become a civil party to the proceedings or, if the public authorities fail to do so, to institute proceedings himself.

28. On principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function. The tricky question of an international court then arises: should this be an ad hoc court, like those established to deal with the violations in the former Yugoslavia or Rwanda, or a standing international court such as is proposed in a document currently before the United Nations General Assembly? Whatever court is finally granted jurisdiction, its rules of procedure must satisfy the criteria of the right to a fair trial. One cannot try perpetrators of violations without oneself respecting human rights.

29. Lastly, international human rights treaties should include a "universal jurisdiction" clause requiring every State party either to try or to extradite perpetrators. Political will is still needed to enforce such clauses. It will be noted, for example, that those in the 1949 Geneva Conventions or the United Nations Convention Against Torture have scarcely ever been applied.

2. Restrictions justified by the desire to combat impunity

30. Restrictions may be applied to certain rules of law in order to support efforts to counter impunity. The aim is to prevent the rules concerned from being used to further impunity, thus obstructing the course of justice. These restrictions relate to the following.

(a) Prescription

31. Prescription cannot be invoked against serious crimes under international law such as crimes against humanity. It cannot run in respect

of any violation while no effective remedy is available. Similarly, prescription cannot be invoked against civil, administrative or disciplinary actions brought by victims.

(b) Amnesty

32. Amnesty cannot be accorded to perpetrators before the victims have obtained justice by means of an effective remedy.

(c) Right to asylum

33. No territorial or diplomatic asylum, or status of political refugee, can be accorded.

(d) Extradition

34. The political nature of the offence may not be advanced as an argument against extradition; nor can the principle of non-extradition of nationals.

(e) Trial in absentia

35. Unlike most Roman-law countries, the common-law countries' legal systems do not acknowledge trial in absentia. This gives a significant fillip to impunity, especially when the countries concerned refuse to cooperate with justice (for example, the International Criminal Tribunal in the Hague). As a compromise, trial in absentia might be countenanced once it has been legally established that cooperation was being refused. If not, the refusal to acknowledge trial in absentia should apply to the judgement phase alone.

(f) Due obedience

36. Due obedience cannot exonerate a perpetrator from criminal responsibility; at most it may be taken into consideration as a mitigating circumstance. Similarly, the fact that violations may have been perpetrated by a subordinate will not exonerate his superiors if they did not use their authority to prevent or halt the violation as soon as they knew - or were in a position to know - that a violation was being or was about to be committed.

(g) Legislation on repentance

37. Legislation on repentance may be advanced in mitigation of evidence but cannot completely exonerate perpetrators; a distinction must be drawn, depending on what risks the perpetrators ran, between revelations made while grave violations were taking place and those made afterwards.

(h) Military courts

38. Because military courts do not have enough statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, excluding serious crimes under international law which must come within the jurisdiction of the ordinary courts.

(i) The principle of the irremovability of judges

39. Irremovability, vital as a safeguard of the independence of the courts, must not become an impunity premium. Judges appointed in conformity with an earlier legal regime may be confirmed in their positions. Conversely, judges appointed unlawfully may be relieved of their functions in accordance with the principle of parallelism.

C. The right to reparation

40. The right to reparation entails both individual measures and general, collective measures.

1. Individual measures

41. Individually, victims - including relatives or dependants - must have an effective remedy. The procedures applicable must be publicized as widely as possible. The right to reparation should cover all injuries suffered by the victim. It embraces three kinds of action:

(a) Restitution (seeking to restore the victim to his previous situation);

(b) Compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal aid costs); and

(c) Rehabilitation (medical care, including psychological and psychiatric treatment).

2. General or collective measures

42. Collectively, symbolic measures - annual homage to the victims or public recognition by the State of its responsibility, for example - besides helping to restore victims' dignity, also help to discharge the duty of remembrance. In France, for example, it took more than 50 years for the Head of State formally to acknowledge, in 1996, the responsibility of the French State for the crimes against human rights committed by the Vichy regime between 1940 and 1944. Mention can be made of similar statements by President Cardoso concerning violations committed under the military dictatorship in Brazil. Above all, the initiative of the Spanish Government, which has just conferred the status of ex-servicemen on the anti-Fascists and International Brigade members who fought on the Republican side during the civil war, must be singled out.

3. Guarantees of non-repetition

43. As the same causes produce the same effects, three steps are necessary to prevent victims from having to face renewed encroachments on their dignity:

(a) Disbandment of parastatal armed groups: this is one of the hardest measures to enforce for, if not accompanied by action to reintegrate group members into society, the cure may be worse than the disease;

(b) Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus; and

(c) Removal from office of senior officials implicated in serious violations. These measures are of a preventive, not punitive, character and must be taken by administrative decision, giving the official the opportunity to seek effective remedy.

II. PROPOSALS AND RECOMMENDATIONS

44. Even before the United Nations began to take action in the campaign against impunity, non-governmental organizations, as has been seen, played a pioneering role and began to trace out a strategy for action. Among the many initiatives taken, those mentioned below have made a particular contribution to the Special Rapporteur's reflections:

(a) The "courts of opinion", in particular the Russell Tribunal, later the Standing People's Tribunal, which in the absence of an international tribunal - under study at the United Nations since 1946 - filled an institutional lacuna in the face of rampant impunity (see Louis Joinet, "Les tribunaux d'opinion", in Marxisme, démocratie et droit des peuples, Hommage à Lelio Basso, (Milan, Editions Franco Angelis, 1979) p. 821);

(b) The international meeting concerning impunity for perpetrators of gross human rights violations, held at the Palais des Nations, Geneva, by the International Commission of Jurists (ICJ) and the National Advisory Committee on Human Rights (CNCDH-France) from 2 to 5 November 1992 (the records of the meeting were published by ICJ under the title Non à l'impunité, oui à la justice, Geneva, 1993);

(c) The report by Mr. Theo van Boven on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8);

(d) The international seminar on impunity and its effects on democratization processes, held in Santiago, Chile, from 13 to 15 December 1996 by the Chilean non-governmental organizations Committee for the Defence of the People's Rights (CODEPU), Social Assistance Foundation of the Christian Churches (FASIC), and Service, Peace and Justice in Latin America - Chile (SERPAJ).

45. These efforts have shown that non-governmental organizations are increasingly aware of the need to back up their campaign with reference to standards drawn from experience and recognized by the international community. This is one of the reasons why the Special Rapporteur proposes adoption of the set of principles for the protection and promotion of human rights through action to combat impunity. But the set of principles is also intended to benefit both the - too few - States showing the political will to tackle impunity and the partners in national "dialogues" or "peace negotiations", who will all have to face this problem.

46. It is against this background and in this spirit that the Special Rapporteur recommends that the Commission on Human Rights and the Economic and

Social Council should propose to the General Assembly adoption of the set of principles as a broad strategic framework for the campaign against impunity, but also, in a more technical light, as an aid to those negotiating peace agreements, and the politicians supervising them, in reaching a decision.

47. Annexed to this final, revised and expanded report is the revised text of the set of principles as requested by the Sub-Commission in its decision 1996/119. Annex I gives a synoptical table of the set of principles, and the full text appears in annex II.

CONCLUSION

48. In concluding, the Special Rapporteur would like to draw attention to a number of particularly alarming situations for which he must admit he has no solutions to propose, though such situations - albeit largely for technical reasons - help to perpetuate impunity. How is it possible to combat impunity and ensure a victim's right to justice when the number of people imprisoned on suspicion of serious human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time? Mention can be made of the case of Rwanda where, according to the Special Rapporteur, Mr. René Degni-Segui (E/CN.4/1997/61, para. 69), over 90,000 people, most of them facing charges of genocide, are in prison while the justice system, which has been much disrupted by events, cannot yet deal with the situation effectively enough. It is also vain to imagine that an international criminal tribunal offers a solution. Such courts by their nature can try only a small number of people annually, - whence the importance in conducting prosecutions of setting priorities and trying first, wherever possible, those perpetrators of crimes under international law who are at the top of the hierarchy.

AFTERWORD

49. To those who might be tempted to regard the set of principles proposed here as an obstacle to national reconciliation, I would answer this: these principles are not legal standards in the strict sense, but guiding principles intended not to thwart reconciliation but to avoid distortions in policies so that, once beyond the first stage, which is more "conciliation" than reconciliation, the foundations of a "just and lasting reconciliation" may be laid.

50. Before turning over a new leaf one must have read the old one. But the campaign against impunity is not just a legal and political issue: its ethical dimension is all too often forgotten.

51. "From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity." This sentiment, which opened the preliminary report submitted to the Sub-Commission in 1993 (E/CN.4/Sub.2/1993/6), is still valid, and makes an appropriate afterword.

Annex I

SYNOPTICAL TABLE OF THE SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

PREAMBLE

DEFINITIONS

"Impunity", "serious crimes under international law"

I. THE RIGHT TO KNOW

A. General principles

Principle 1: The inalienable right to the truth

Principle 2: The duty to remember

Principle 3: The victims' right to know

Principle 4: Guarantees to give effect to the right to know

B. Extrajudicial commissions of inquiry

Principle 5: Role of the extrajudicial commissions of inquiry

Principle 6: Guarantees of independence and impartiality

Principle 7: Definition of the commissions' terms of reference

Principle 8: Guarantees for persons implicated

Principle 9: Guarantees for witnesses and victims

Principle 10: Operation of the commissions

Principle 11: Advisory functions of the commissions

Principle 12: Publicizing the reports of the commissions

C. Preservation of and access to archives

Principle 13: Measures for the preservation of archives

Principle 14: Administration of archive centres

Principle 15: Administrative measures relating to archive inventories

Principle 16: Measures to facilitate access to archives

Principle 17: Cooperation between archive departments and the courts and extrajudicial commissions of inquiry

Principle 18: Specific measures relating to archives containing names

II. RIGHT TO JUSTICE

A. General principles

Principle 19: Safeguards against the use of reconciliation or forgiveness to further impunity

Principle 20: Duties of States with regard to the administration of justice

B. Distribution of jurisdiction between national, foreign and international courts

Principle 21 Jurisdiction of international criminal courts

Principle 22: Rules of procedure applicable in international courts

Principle 23: Jurisdiction of foreign courts

Principle 24: Measures to strengthen the effectiveness of treaty provisions on universal jurisdiction

Principle 25: Measures to determine extraterritorial jurisdiction in internal law

C. Restrictive measures justified by action to combat impunity

Principle 26: Scope of restrictive measures

Principle 27: Restrictions relating to prescription

Principle 28: Restrictions on the practice of amnesty

Principle 29: Restrictions on the right of asylum

Principle 30: Restrictions on extradition

Principle 31: Restrictions on the exclusion of *in absentia* procedure

Principle 32: Restrictions on the principle of due obedience

Principle 33: Restrictions on the effects of legislation on repentance

Principle 34: Restrictions on the jurisdiction of military courts

Principle 35: Restrictions on the principle of the irremovability of judges

III. RIGHT TO REPARATION

A. General principles

Principle 36: Rights and duties arising out of the obligation to make reparation

Principle 37: Reparation procedures

Principle 38: Publicizing reparation procedures

Principle 39: Scope of the right to reparation

B. Individual measures of reparation

Principle 40: Measures of restitution

Principle 41: Measures of compensation

Principle 42: Measures of rehabilitation

Principle 43: Special measures in cases of forced disappearance

C. General or collective measures of reparation

Principle 44: Measures of satisfaction

D. Guarantees of non-repetition

Principle 45: Areas affected by guarantees of non-repetition

Principle 46: Disbandment of unofficial armed groups directly or indirectly linked to the State and of private groups benefiting from its passivity

Principle 47: Repeal of emergency legislation and abolition of emergency courts

Principle 48: Administrative and other measures relating to State officials implicated in serious human rights violations

Principle 49: Implementation of administrative measures

Principle 50: Nature of measures that can be taken against State officials

Annex II

SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

PREAMBLE

The General Assembly,

Recalling the Preamble of the Universal Declaration of Human Rights, which states that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,

Aware that there is always a risk that such acts may occur,

Reaffirming the commitment made by the Member States under Article 56 of the Charter of the United Nations to take joint and separate action, giving full importance to developing effective international cooperation for the achievement of the purposes set forth in Article 55 of the Charter concerning universal respect for, and observance of, human rights and fundamental freedoms for all,

Considering that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity,

Recalling the recommendation contained in paragraph 91 of Part II of the Vienna Declaration and Programme of Action, wherein the World Conference on Human Rights (June 1993) expressed its concern about the impunity of perpetrators of human rights violations and encouraged the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue,

Convinced, therefore, that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity,

Decides, pursuant to the aforesaid recommendation of the Vienna Declaration and Programme of Action, solemnly to proclaim the following principles for the guidance of States having to combat impunity.

DEFINITIONS

A. Impunity

"Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject

to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.

B. Serious crimes under international law

This term, as used in these principles, covers war crimes, crimes against humanity, including genocide, and grave breaches of and crimes against international humanitarian law.

I. THE RIGHT TO KNOW

A. General principles

PRINCIPLE 1. THE INALIENABLE RIGHT TO THE TRUTH

Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.

PRINCIPLE 2. THE DUTY TO REMEMBER

A people's knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

PRINCIPLE 3. THE VICTIMS' RIGHT TO KNOW

Irrespective of any legal proceedings, victims, their families and dear ones have the right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.

PRINCIPLE 4. GUARANTEES TO GIVE EFFECT TO THE RIGHT TO KNOW

To give effect to the right to know, States must take appropriate action. Failing judicial institutions, priority should initially be given to establishing extrajudicial commissions of inquiry and ensuring the preservation of, and access to, the archives concerned.

B. Extrajudicial Commissions of Inquiry

PRINCIPLE 5. ROLE OF THE EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The Extrajudicial Commissions of Inquiry shall have the task of establishing the facts so that the truth can be found, and of preventing evidence from disappearing. In order to restore the dignity of the victims, families and human rights defenders, these investigations shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.

PRINCIPLE 6. GUARANTEES OF INDEPENDENCE AND IMPARTIALITY

In order to found their legitimacy upon incontestable guarantees of independence and impartiality, the terms of reference of the Commissions must respect the following principles: Commissions

(a) Shall be established by law or, depending on the circumstances, by a contractual instrument or treaty clause concluding a process of national dialogue or a peace accord;

(b) Shall be constituted in accordance with criteria making clear to the public the impartiality of their members and on conditions ensuring their independence, in particular by the irremovability of their members for the duration of their terms of office, guaranteed immunities and privileges essential to their safety, including after their mission is over, and the power to require assistance from the public authorities if necessary.

PRINCIPLE 7. DEFINITION OF THE COMMISSIONS' TERMS OF REFERENCE

To avoid conflicts of jurisdiction, the terms of reference of the Commissions must be set forth clearly. They shall incorporate at least the following stipulations and limitations:

(a) The Commissions are not intended to act as substitutes for the civil, administrative or criminal courts, which shall alone have jurisdiction to establish individual criminal or other responsibility with a view to reaching a decision as to guilt and, where appropriate, passing sentence;

(b) Their investigations shall relate to all persons cited in allegations of human rights violations, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups with any kind of link to the State, or of non-governmental armed movements having the status of belligerents. If the circumstances so warrant, they may also extend to serious crimes allegedly committed by any other organized, armed group;

(c) The Commissions shall have jurisdiction to consider all forms of human rights violations. Their investigations shall focus as a matter of priority on those violations appearing to constitute a consistent pattern of gross violations. They shall endeavour:

(i) To analyse and describe the machinery of the State through which the violating system operated, and to identify the victims and the administrations, agencies and private entities involved and reconstruct their roles;

(ii) To safeguard evidence for later use in the administration of justice;

(iii) To recommend ways of diminishing the effects of impunity.

PRINCIPLE 8. GUARANTEES FOR PERSONS IMPLICATED

Any persons implicated when the facts are established shall be entitled, especially if the Commission is permitted under its terms of reference to divulge their names, to the following guarantees based on the adversarial principle:

(a) The Commission must strive to corroborate information gathered by other sources;

(b) The person implicated shall have the opportunity to make a statement setting out his or her version of the facts or, within the time prescribed by the instrument establishing the Commission, to submit a document equivalent to a right of reply for inclusion in the file. The rules of evidence provided for in principle 18 (c) shall apply.

PRINCIPLE 9. GUARANTEES FOR WITNESSES AND VICTIMS

Steps shall be taken to guarantee the security and protection of witnesses and victims.

(a) They may be called upon to testify before the Commission only on a strictly voluntary basis;

(b) If anonymity is deemed necessary in their interests, it may be allowed only on three conditions, namely:

(i) That it is an exceptional measure, except in the case of victims of sexual abuse;

(ii) That the Chairman and one member of the Commission are empowered to satisfy themselves that the application is warranted and ascertain, in confidence, the identity of the witness so as to be able to give assurances to the other members of the Commission;

(iii) That the report will normally refer to the gist of the testimony if it is accepted by the Commission.

PRINCIPLE 10. OPERATION OF THE COMMISSIONS

The Commissions shall be provided with:

(a) Transparent funding to prevent them from coming under suspicion;

(b) Sufficient material and human resources for their credibility not to be open to question.

PRINCIPLE 11. ADVISORY FUNCTIONS OF THE COMMISSIONS

The Commissions' terms of reference shall include provisions calling for them to make recommendations on action to combat impunity in their final reports.

These recommendations shall contain proposals aimed, inter alia, on the basis of the facts and of any responsibility that has been established, at encouraging the perpetrators of the violations to admit their guilt.

The recommendations shall, in addition, set out legislative or other measures to put these principles into effect and to prevent any further violations. These measures shall primarily concern the army, police and justice system and the strengthening of democratic institutions.

PRINCIPLE 12. PUBLICIZING THE REPORT OF THE COMMISSIONS

For security reasons or in order to avoid pressure on witnesses and Commission members, the Commissions' terms of reference may stipulate that the inquiry shall be kept confidential. The complete final report, on the other hand, should always be made public and be disseminated as widely as possible.

Commission members shall be protected by immunity from any defamation or other civil or criminal proceedings that might be brought against them in connection with material contained in the report.

C. Preservation of and access to archives

PRINCIPLE 13. MEASURES FOR THE PRESERVATION OF ARCHIVES

The right to know means that archives should be preserved. Technical measures of a protective nature shall be taken to prevent the removal, destruction, concealment or falsification of archives containing evidence of violations.

These urgent measures shall be followed by legislative or other reforms permanently governing the storage and preservation of and access to the archives in accordance with the principles set out below; specific measures shall be taken in the case of archives containing names in accordance with principle 18. Third countries in possession of such archives are invited to cooperate in their restitution.

Severe penalties shall be laid down for misappropriation of archives, especially with a view to negotiating payment for them.

PRINCIPLE 14. ADMINISTRATION OF ARCHIVE CENTRES

Measures shall be taken to place each archive centre under the responsibility of a specifically designated person. If that person was already in charge of the archive centre during the reference period, he or she must be explicitly redesignated, subject to the modalities stipulated in principles 49 and 50.

PRINCIPLE 15. ADMINISTRATIVE MEASURES RELATING TO ARCHIVE INVENTORIES

Priority shall initially be given to drawing up inventories of the archives stored including, with their cooperation, those held in

third countries, and ascertaining the reliability of existing inventories. Special attention shall be given to archives of places of detention, in particular when such places did not exist officially.

PRINCIPLE 16. MEASURES TO FACILITATE ACCESS TO ARCHIVES

Access to archives shall be facilitated, in the interest of historical research in particular. Authorization formalities shall normally have the sole purpose of controlling access and may not be used for purposes of censorship.

PRINCIPLE 17. COOPERATION BETWEEN ARCHIVE DEPARTMENTS AND THE COURTS AND EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The courts and extrajudicial commissions of inquiry, as well as the investigators reporting to them, shall have free access to archives. Considerations of national security may not be invoked to prevent access. In accordance with their sovereign powers of assessment, however, the courts and extrajudicial commissions of inquiry may decide, in exceptional circumstances, not to make certain information public if it might jeopardize the restoration of the rule of law.

PRINCIPLE 18. SPECIFIC MEASURES RELATING TO ARCHIVES CONTAINING NAMES

(a) For the purposes of this principle, archives containing names shall be understood to be those archives containing information that make it possible, in any way whatsoever, directly or indirectly, to identify the individuals to whom they relate, regardless of whether such archives are on paper or in computer files.

(b) Everyone shall be entitled to know whether his or her name appears in the archives and, if it does, to exercise his or her right of access and challenge the validity of the information concerning him or her by exercising a right of reply. The document containing his or her own version shall be attached to the document challenged.

(c) Except where it relates to service officials or persons working with them on an ongoing basis, information in information service archives containing names shall not by itself constitute incriminating evidence, unless it is corroborated by several other reliable sources.

II. RIGHT TO JUSTICE

A. General principles

PRINCIPLE 19. SAFEGUARDS AGAINST THE USE OF RECONCILIATION OR FORGIVENESS TO FURTHER IMPUNITY

There can be no just and lasting reconciliation without an effective response to the need for justice; an important element in reconciliation is forgiveness, a private act which implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance.

PRINCIPLE 20. DUTIES OF STATES WITH REGARD TO THE ADMINISTRATION OF JUSTICE

Impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished, to provide the victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.

Although the decision to prosecute is primarily within the competence of the State, supplementary procedural rules should be set forth to enable any victim to institute proceedings on his or her own behalf where the authorities fail to do so, or to become an associated party. This option shall be extended to non-governmental organizations able to show proof of long-standing activities for the protection of the victims concerned.

B. Distribution of jurisdiction between national, foreign and international courts

PRINCIPLE 21. JURISDICTION OF INTERNATIONAL CRIMINAL COURTS

To avoid the need to apply to ad hoc international criminal courts, a standing international criminal court must be set up with jurisdiction binding on all Member States.

It shall remain the rule that national courts normally have jurisdiction, particularly when the offence as defined in domestic law does not fall within the terms of reference of the international court. International criminal courts shall have concurrent jurisdiction where national courts cannot yet offer satisfactory guarantees of independence and impartiality, or are physically unable to function.

To this purpose the international criminal court may at any point in the proceedings require the national court to relinquish a case to it.

PRINCIPLE 22. RULES OF PROCEDURE APPLICABLE IN INTERNATIONAL COURTS

The rules of procedure applicable in international courts shall conform to the provisions of articles 8 to 11 of the Universal Declaration of Human Rights and 9, 14 and 15 of the International Covenant on Civil and Political Rights with regard to the right to a fair hearing.

PRINCIPLE 23. JURISDICTION OF FOREIGN COURTS

The subsidiary jurisdiction of foreign courts shall be exercised by virtue either of a provision on universal jurisdiction set forth in a treaty in force or of a provision of internal law establishing a rule of extraterritorial jurisdiction for serious crimes under international law.

PRINCIPLE 24. MEASURES TO STRENGTHEN THE EFFECTIVENESS OF TREATY PROVISIONS ON UNIVERSAL JURISDICTION

(a) A provision on universal jurisdiction applicable to serious crimes under international law should be included in all international human rights instruments dealing with such crimes.

(b) By ratifying such instruments, States will pledge, pursuant to such a provision, to seek and prosecute persons against whom there are specific, consistent allegations of involvement in a serious crime under international law, with a view to trying or extraditing them. They are consequently bound to take legislative or other measures under internal law to ensure the implementation of the provision on universal jurisdiction.

PRINCIPLE 25. MEASURES TO DETERMINE EXTRATERRITORIAL JURISDICTION IN INTERNAL LAW

In the absence of a ratification making it possible to apply a universal jurisdiction clause to the country where the crime was committed, States may for efficiency's sake take measures in their internal legislation to establish extraterritorial jurisdiction over serious crimes under international law committed outside their territory which by their nature are within the purview not only of internal criminal law but also of an international punitive system to which the concept of frontiers is alien.

C. Restrictive measures justified by action to combat impunity

PRINCIPLE 26. SCOPE OF RESTRICTIVE MEASURES

Safeguards must be established against the misuse to further impunity of prescription, amnesty, right to asylum, refusal to extradite, absence of in absentia procedure, due obedience, legislation on repentance, the jurisdiction of military courts and the irremovability of judges.

PRINCIPLE 27: RESTRICTIONS ON PRESCRIPTION

Prescription - of prosecution or penalty - in criminal cases shall not run while no effective remedies are in existence.

Prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible.

When it does apply, prescription shall not be invoked against civil or administrative actions brought by victims seeking reparation for their injuries.

PRINCIPLE 28. RESTRICTIONS ON THE PRACTICE OF AMNESTY

When amnesty is intended to establish conditions conducive to a peace agreement or to foster national reconciliation, it shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law and the perpetrators of gross and systematic violations may not be included in the amnesty unless the victims have been unable to avail themselves of an effective remedy and obtain a fair and effective decision;

(b) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have done nothing but exercise this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;

(c) Any individual convicted of offences other than those laid down in paragraph (b) of this principle who comes within the scope of the amnesty is free to refuse it and request a retrial if he has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights or if he has been subjected to inhuman or degrading interrogation, especially under torture.

PRINCIPLE 29. RESTRICTIONS ON THE RIGHT OF ASYLUM

Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.

PRINCIPLE 30. RESTRICTIONS ON EXTRADITION

Persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country.

PRINCIPLE 31. RESTRICTIONS ON THE EXCLUSION OF <u>IN ABSENTIA</u> PROCEDURE

Except for establishing a guarantee of impunity, non-recognition of <u>in absentia</u> procedure by a legal system should be limited to the sentencing stage to enable the necessary investigations, including the hearing of witnesses and victims, to be carried out and charges to be preferred, followed by wanted notices and arrest warrants, if necessary international, executed according to the procedures laid down in the Constitution of the International Criminal Police Organization (ICPO) - Interpol.

PRINCIPLE 32. RESTRICTIONS ON THE PRINCIPLE OF DUE OBEDIENCE

(a) The fact that the perpetrator of violations acted on the orders of his Government or of a superior does not exempt him from criminal or other responsibility but may be regarded as grounds for reducing the sentence if justice permits.

(b) The fact that violations have been committed by a subordinate does not exempt his superiors from criminal or other responsibility if they knew or had at the time reason to believe that the subordinate was committing or about to commit such a crime and they did not take all action within their power to prevent or stop him. The official status of a perpetrator of a crime under international law - even a head of State or government - does not exempt him or her from criminal responsibility and is not grounds for a reduction of sentence.

PRINCIPLE 33. RESTRICTIONS ON THE EFFECTS OF LEGISLATION ON REPENTANCE

The fact that, once the period of persecution is over, a perpetrator discloses the violations that he or others have committed in order to benefit from the favourable provisions of legislation on repentance cannot exempt him from criminal or other responsibility. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.

Disclosures made during the period of persecution may attract a reduction extending as far as absolute discharge in view of the risks the perpetrator ran at the time. In that case, principle 30 notwithstanding, the perpetrator may be granted asylum - not refugee status - in order to facilitate revelation of the truth.

PRINCIPLE 34. RESTRICTIONS ON THE JURISDICTION OF MILITARY COURTS

In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to specifically military offences committed by military personnel, excluding human rights violations constituting serious crimes under international law, which come under the jurisdiction of the ordinary domestic courts or, where necessary, an international court.

PRINCIPLE 35. RESTRICTIONS ON THE PRINCIPLE OF THE IRREMOVABILITY OF JUDGES

The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in accordance with a procedure consistent with a constitutional State. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions in accordance with the principle of parallelism. They may ask to be afforded the guarantees laid down in principles 49 and 50, in particular with a view to seeking reinstatement, where applicable.

III. RIGHT TO REPARATION

A. General principles

PRINCIPLE 36. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION

Any human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator.

PRINCIPLE 37. REPARATION PROCEDURES

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings covered by the restrictions on prescription set out in principle 29. Their exercise of this right shall afford them protection against intimidation and reprisals. Exercise of the right to reparation includes access to the applicable international procedures.

PRINCIPLE 38. PUBLICIZING REPARATION PROCEDURES

Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private, as well as public, communications media. This dissemination should take place both within and outside the country, through, among other channels, consular departments particularly in countries to which large numbers of victims have been forced into exile.

PRINCIPLE 39. SCOPE OF THE RIGHT TO REPARATION

The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, and general reparation measures such as measures of satisfaction and guarantees of non-repetition.

B. Individual measures of reparation

PRINCIPLE 40. MEASURES OF RESTITUTION

Restitution, the purpose of which shall be to seek to restore the victim to his or her former circumstances, entails restoring, inter alia, the exercise of individual freedoms and the right to citizenship, to family life, to return to one's country, to employment and to property ownership.

PRINCIPLE 41. MEASURES OF COMPENSATION

Compensation must equal the financially assessable value of all damage suffered, particularly:

(a) Physical or mental injury, including pain, suffering and emotional shocks;

(b) The loss of an opportunity, including educational opportunities;

(c) Material damage and loss of income, including loss of earnings;

(d) Attacks on reputation or dignity;

(e) Costs of legal assistance and valuations.

The right to compensation may be exercised collectively, on behalf of groups of victims, under bilateral or multilateral agreements following an armed conflict.

PRINCIPLE 42. MEASURES OF REHABILITATION

Measures of rehabilitation shall include coverage of the costs of medical, psychological or psychiatric care, as well as social, legal and other services.

PRINCIPLE 43. SPECIAL MEASURES IN CASE OF FORCED DISAPPEARANCE

When the fate of a disappeared person is elucidated, the victim's family must be notified so that, should the victim have died, the body can be reclaimed after identification whether or not the perpetrators have been identified, prosecuted or tried.

C. General or collective measures of reparation

PRINCIPLE 44. MEASURES OF SATISFACTION

Symbolic measures shall be taken in the following areas as moral and collective reparation and to satisfy the duty to remember:

(a) Public recognition by the State of its responsibility;

(b) Official declarations rehabilitating victims;

(c) Commemorative ceremonies, naming of public thoroughfares, monuments, etc.;

(d) Periodic tribute to the victims;

(e) Acknowledgement in history textbooks and human rights training manuals of a faithful account of exceptionally serious violations.

D. Guarantees of non-repetition

PRINCIPLE 45. AREAS AFFECTED BY GUARANTEES OF NON-REPETITION

The State shall take appropriate measures to ensure that the victims cannot again be confronted with violations which undermine their dignity. Priority consideration shall be given to:

(a) Measures to disband parastatal armed groups;

(b) Measures repealing emergency provisions, legislative or otherwise, which have been conducive to violations;

(c) Administrative or other measures vis-à-vis State officials implicated in serious human rights violations.

PRINCIPLE 46. DISBANDMENT OF UNOFFICIAL ARMED GROUPS DIRECTLY OR INDIRECTLY LINKED TO THE STATE AND OF PRIVATE GROUPS BENEFITING FROM ITS PASSIVITY

In order to ensure the effective disbandment of such groups, the measures to be taken shall be first and foremost in the following areas:

(a) Reconstruction of organizational structure by identifying operatives so as to reveal their position, if any, in the administration, particularly in the army and the police, and by determining the covert links which they maintained with their active or passive partners, particularly in the information and security services or in pressure groups. The information thus acquired shall be made public;

(b) Thorough investigation of the information and security services with a view to redefining their functions;

(c) Securing the cooperation of third countries which might have contributed to the creation and development of such groups, particularly by providing financial or logistical support;

(d) Drawing up a recycling plan to ensure that members of such groups are not tempted to join the ranks of organized crime.

PRINCIPLE 47. REPEAL OF EMERGENCY LEGISLATION AND COURTS

Emergency legislation and courts of any type adopted or set up during the period of repression must be repealed or abolished insofar as they infringe the fundamental rights and freedoms guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Habeas corpus, whatever name it may be known by, must be considered a fundamental right of the individual and as such a non-derogable right.

PRINCIPLE 48. ADMINISTRATIVE AND OTHER MEASURES VIS-A-VIS STATE OFFICIALS IMPLICATED IN SERIOUS HUMAN RIGHTS VIOLATIONS

These measures are of a preventive, not punitive character; they may therefore be taken by administrative decision, provided that the implementation procedures are provided for by legislation, or by a contractual agreement concluding a process of national dialogue or a peace accord, as the case may be.

They are intended to avoid any administrative obstacle or challenge to the process of restoring, or the transition to, peace and/or democracy.

They are therefore quite distinct from the punitive and judicial measures provided for in principles 19 et seq. to be applied by the courts to persons prosecuted and tried for human rights violations.

PRINCIPLE 49. IMPLEMENTATION OF ADMINISTRATIVE MEASURES

Implementation of administrative measures should be preceded by an inventory of positions of responsibility with important decision-making power and therefore an obligation of loyalty to the process in progress. In the inventory, priority should be given to positions of responsibility in the army, the police and the judiciary.

In assessing the situation of each serving official, consideration will be given to:

(a) His human-rights record, particularly during the period of repression;

(b) Non-involvement in corruption;

(c) Professional competence;

(d) Skill in promoting the peace and/or democratization process, particularly with regard to the observance of constitutional guarantees and human rights.

Decisions shall be made by the head of Government or, under his responsibility, by the minister under whom the official works after the official concerned has been informed of the complaints against him and has been given a due hearing or summonsed for this purpose.

The official may appeal to the appropriate administrative court.

However, in view of the special circumstances inherent in any transition period, the appeal may be heard by an ad hoc commission with exclusive jurisdiction, provided that it meets the criteria of independence, impartiality and procedure laid down in principles 6, 7 (a), 8 (a) and (b) and 10.

PRINCIPLE 50. NATURE OF MEASURES THAT CAN BE TAKEN AGAINST STATE OFFICIALS

Except where he has been confirmed in his position, the official concerned may be:

(a) Suspended pending his confirmation or appointment to another post;

(b) Transferred;

(c) Demoted;

(d) Offered early retirement;

(e) Dismissed.

In the case of judges, the decision shall be taken in the light of the relevant provisions of principle 35.

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THE ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS

Report of the sessional working group on the administration of justice

Chairman-Rapporteur: Mr. Louis Joinet

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Introduction

1. In accordance with the decision taken by the Sub-Commission on 5 August 1997, a sessional working group of the Sub-Commission on the administration of justice held its first meeting on 6 August 1997. The following experts were appointed as members of the working group on 6 August 1997: Mr. Stanislav Chernichenko (Eastern Europe), Mr. Alberto Diaz Uribe (Latin America), Ms. Lucy Gwanmesia (Africa), Mr. Louis Joinet (Western European and other States) and Mr. Sang Yong Park (Asia).

2. The working group held three meetings, on 6, 11 and 15 August 1997.

3. A representative of the Centre for Human Rights opened the session of the working group.

4. The working group designated Mr. Louis Joinet as Chairman-Rapporteur for its 1997 session.

5. The following members of the Sub-Commission not members of the working group also took part in the general discussion: Mr. Miguel Alfonso Martínez (1st and 2nd meetings), Mr. Fix Zamudio (1st meeting), Mr. El-Hadji Guissé (1st and 2nd meetings), Ms. Claire Palley (1st and 2nd meetings) Mr. Fan Guoxiang (1st meeting) and Mr. Zhong Shukong (2nd meeting).

6. The working group had before it the following documents relating to its provisional agenda:

Working paper submitted by Mr. Miguel Alfonso Martínez concerning the study of the issue of the privatization of prisons (E/CN.4/Sub.2/1991/56);

Outline prepared by Ms. Claire Palley pursuant to Sub-Commission decision 1992/107 on the possible utility, scope and structure of a special study on the issue of privatization of prisons (E/CN.4/Sub.2/1993/21);

Expanded working paper submitted by Mr. Stanislav Chernichenko in accordance with decision 1996/116 of the Sub-Commission on recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime (E/CN.4/Sub.2/1997/29);

Conference room paper prepared by Mr. David Weissbrodt on habeas corpus, amparo and similar procedures as non-derogable rights (E/CN.4/Sub.2/1997/WG.1/CRP.1);

Report of the sessional working group on the administration of justice and the question of compensation on its 1996 session (E/CN.4/Sub.2/1996/16).

Adoption of the agenda

7. At its 1st meeting, the working group considered the provisional agenda. At the suggestion of the Chairman-Rapporteur, based on formal and informal consultations with other members of the working group, the working group decided to adopt the following agenda:

1. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

2. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Summary, arbitrary and extrajudicial executions.

3. Habeas corpus as a non-derogable right [and as one of the requirements for the right to a fair trial].

4. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

5. Juvenile justice.

6. Privatization of prisons.

7. Recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime.

8. Provisional agenda for the next session.

9. Adoption of the report of the working group to the Sub-Commission.

I. FOLLOW-UP MEASURES TO THE DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

8. The Chairman-Rapporteur stated that, because of the financial difficulties encountered by the High Commissioner/Centre for Human Rights, it had not been possible to hold, as had been hoped, a small drafting meeting to improve the preliminary draft, with the object of facilitating the task of the Working Group. It had therefore not been possible to examine and revise the preliminary draft. The Chairman/Rapporteur considered that such a meeting might take place in the autumn of 1997 and he therefore suggested that consideration of the agenda item should be postponed until the next session of the Working Group.

II. ISSUES RELATED TO THE DEPRIVATION OF THE RIGHT TO LIFE

9. Mr. Guissé, who had been asked to submit a follow-up report on the evolution of capital punishment*, said that the recent evolution of that penalty had been marked by ups and downs. A progress report on the abolition and maintenance of the death penalty throughout the world had been drawn up. According to reports by Amnesty International, the number of countries which

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* The report, in its original French version, is available in the secretariat of the Centre for Human Rights.

had abolished the death penalty by legislation was now 54; in 15 countries it had been legally abolished except for war crimes, and 27 countries had not applied the death penalty for more than 10 years. Regarding the latter cases, he emphasized the desirability of moving on to legal abolition, which would constitute a better safeguard.

10. In 1995, according to the same reports, 97 countries were applying the death sentence. Mr. Guissé had noted a substantial rise in the number of executions in those countries and he drew attention to the discrimination suffered by certain categories of persons as regards application of the death penalty. He also referred to the frequency of summary executions, enforced disappearances and cruel treatment, which were rarely condemned by the Governments concerned.

11. Mr. Guissé then went on to refer to the categories of persons who were particularly vulnerable. Minors should benefit from a reduction of criminal responsibility on the grounds of their lack of maturity. Similarly, for humanitarian reasons, capital punishment should not be imposed on pregnant women or on mothers of young children. Furthermore, the mentally ill and the mentally disabled should not be held criminally responsible, because such patients lacked discernment. That measure could also be extended to older persons.

12. Finally, with a view to encouraging abolition of the death penalty, he referred to practices which guaranteed a fair trial, such as the appointment of counsel by courts, legal aid, personality investigation and the abolition of special courts. At the international level, he suggested that the United Nations should undertake a study of substitutes for the death penalty, with the aim of supporting the efforts of those countries which wished to institute alterative penalties that were socially and juridically useful.

13. The Chairman-Rapporteur suggested that Mr. Guissé should continue to prepare his annual follow-up report on the matter. Both Mr. Guissé and the Working Group approved that suggestion.

III. HABEAS CORPUS AS A NON-DEROGABLE RIGHT AND AS ONE OF THE REQUIREMENTS FOR THE RIGHT TO A FAIR TRIAL

14. The Chairman-Rapporteur asked Mr. Weissbrodt to introduce the paper he had prepared on the basis of a request by the sessional working group at its 1996 session (see E/CN.4/Sub.2/1996/16). His paper was entitled Habeas corpus, amparo and similar procedures as non-derogable rights, (E/CN.4/Sub.2/1997/WG.1/CRP.1). In introducing his paper Mr. Weissbrodt referred to: (a) the recommendations of the final study of Ms. Nicole Questiaux, then Special Rapporteur on states of emergency (E/CN.4/Sub.2/1982/15); (b) the recommendations of the Sub-Commission's Special Rapporteur on human rights and states of emergency, Mr. Leonardo Despouy; (c) the efforts of the working group on the administration of justice and the question of compensation (and its predecessor working group on detention) to strengthen safeguards for the writ of habeas corpus; (d) the Sub-Commission's drafting and the subsequent adoption of the Declaration on the Protection of All Persons from Enforced

Disappearance; (e) the Sub-Commission's study on the right to a fair trial and a remedy; and (f) Sub-Commission resolution 1991/15, subsequently adopted by the Commission as resolution 1992/35, which called upon all States that had not yet done so to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and may order his or her release if the detention is found to be unlawful and to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency.

15. Mr. Weissbrodt noted that he had been asked to consult, and had in fact consulted, with the Chairman-Rapporteur and Mr. Hector Fix Zamudio, alternate member from Mexico, who was a recognized expert on amparo. Mr. Weissbrodt proposed that the working group prepare a draft decision for the Sub-Commission asking the Chairman-Rapporteur to send a letter to Ms. Christine Chanet, President of the Human Rights Committee, recommending that the Committee consider preparing a new general comment on article 4, which would reaffirm the developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable.

16. Mr. Guissé noted the great importance of procedures such as habeas corpus and indicated that further consideration needed to be given to how to make such procedures effective in the national context. The Chairman-Rapporteur asked Mr. Fix Zamudio and Mr. Weissbrodt whether they would be willing to prepare a report for the 1998 session along the lines suggested by Mr. Guissé. Mr. Fix Zamudio confirmed that he agreed with the substance of Mr. Weissbrodt's present paper, referred to the experience of the Inter-American Court of Human Rights, and agreed to prepare a further report as suggested by Mr. Guissé and in consultation with Mr. Weissbrodt. Ms. Gwanmesia spoke about the importance of the writ of habeas corpus and its application in her country.

17. Mr. Alfonso Martínez expressed the view that it would be preferable if the Sub-Commission's views on this important issue could be conveyed to the Human Rights Committee in a more formal fashion. The question offered a suitable opportunity to foster cooperation between the Sub-Commission and a treaty body. In addition, he had strong concerns about one particular paragraph of the letter suggested in document E/CN.4/Sub.2/1997/WG.1/CPR.1.

18. Mr. Guissé and Ms. Gwanmesia said that both the content of any communication with the Human Rights Committee and the way it would be addressed to the Committee should be approved by the plenary of the Sub-Commission.

19. Mr. Weissbrodt indicated that the paragraph mentioned by Mr. Alfonso Martínez was not necessary.

20. The Chairman-Rapporteur indicated that he had consulted informally with the President of the Human Rights Committee and it appeared that the Committee would be prepared to consider the suggestion contained in Mr. Weissbrodt's paper.

21. The Chairman-Rapporteur proposed that the working group recommend a draft decision to the Sub-Commission by which it would send a copy of the report of the 1997 session of the working group on the administration of justice which would contain the substance of the content of document E/CN.4/Sub.2/1997/WG.1/CRP.1, as modified in the light of the discussion.

22. The working group decided to recommend to the Sub-Commission that it adopt a decision (a) calling on the Human Rights Committee to consider preparing a new general comment on article 4, reaffirming the developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable at all times and under all circumstances, including during states of emergency; (b) calling upon all States to incorporate in their domestic law provisions making habeas corpus a non-derogable right; and (c) conveying to the Human Rights Committee a copy of the report of the 1997 session of the working group which would contain the substance of the recommendation contained in E/CN.4/Sub.2/1997/WG.1/CRP.1, as modified in the light of the discussion.

23. The proposed text of the communication to the Human Rights Committee reads as follows:

> "The sessional working group on the administration of justice of the Sub-Commission on Prevention of Discrimination and Protection of Minorities has for several years been considering how to reaffirm that the right to habeas corpus and similar aspects of amparo is non-derogable under article 4 of the International Covenant on Civil and Political Rights.
>
> "While the Covenant does not use the terms 'habeas corpus' or 'amparo', it contains several provisions which guarantee the essence of the habeas corpus writ and aspects of the amparo procedure which are similar in impact to habeas corpus. Article 9 (3) states: 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ...' Article 9 (4) states: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'
>
> "The right to habeas corpus and related aspects of amparo are also inherent in article 2 (3), which states:
>
> > 'Each State Party to the present Covenant undertakes:
> >
> > '(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> >
> > '(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

'(c) To ensure that the competent authorities shall enforce such remedies when granted.'

"Article 4 indicates those rights which are considered to be non-derogable and the Human Rights Committee in 1981 issued a very brief general comment on that provision.

"Although habeas corpus and the related aspects of amparo for challenging detention were not expressly made non-derogable under article 4 of the International Covenant on Civil and Political Rights, habeas corpus/amparo has gradually been recognized as non-derogable. These developments have occurred because of the recognition that without the ability to challenge the legality of one's detention, especially in times of public emergency, one will never be assured of the other fundamental rights in the Covenant.

"Two Advisory Opinions issued by the Inter-American Court of Human Rights have concurred in holding that habeas corpus and amparo - the legal remedies guaranteed in articles 7 (6) and 25 (1) of the American Convention - may not be suspended, even in emergency situations, because they are among the 'judicial guarantees essential' to protect the rights whose suspension article 27 (2) of the American Convention prohibits (Advisory Opinion of 9 May 1986, Inter-Am. C.H.R., 13 OEA/Ser.L/III.15, doc. 14 (1986) and Advisory Opinion of 6 October 1987, Inter-Am. C.H.R. 13 OEA/Ser.L/V/III.19, doc. 13 (1988)). In the first Advisory Opinion, the Court pointed out that habeas corpus performs a vital role in assuring that a person's life and physical integrity are respected. In its second Advisory Opinion, the Inter-American Court stated that the 'essential' judicial guarantees that are not subject to derogation according to article 27 include habeas corpus, amparo, and any other effective remedy before judges or competent tribunals which is designed to guarantee respect for the rights and freedoms whose suspension are not authorized by the American Convention.

"It has been more than 15 years since the Human Rights Committee issued its general comment on article 4 of the Covenant. Since that time there has been a very significant trend (a) in the country conclusions of the Human Rights Committee, (b) in the overall recognition of habeas corpus and related aspects of amparo, and (c) the basic provisions on the right to a fair trial in article 14 (1) as to the understanding of non-derogability within the meaning of article 4. Indeed, there have been other important developments in the general understanding of non-derogable rights which would justify a revision of the general comment on article 4.

"Several years ago the Sub-Commission asked the Human Rights Committee for its views as to the possible elaboration of a third optional protocol to the International Covenant on Civil and Political Rights aiming at making the right to a fair trial and a remedy non-derogable. The Human Rights Committee discouraged the elaboration of such a third optional protocol on the ground that there is an evolving recognition of that right as non-derogable. Because of the Human Rights Committee's

advice, the Sub-Commission did not pursue the idea of a third optional protocol. If the Committee pursues the idea of issuing a revised general comment on article 4, however, it might be appropriate for the Committee also to consider whether it would want to reconfirm that the basic substance of article 14, for example as found in article 14 (1), is non-derogable.

"Accordingly, it is recommended that the Human Rights Committee consider preparing a new general comment on article 4 which reaffirms the developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable."

IV. MEASURES TO BE TAKEN TO GIVE FULL EFFECT TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

24. Mr. Joinet introduced his working paper on measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide. After recalling that the tragic events in Rwanda and the former Yugoslavia had been the reason for the inclusion of the item in the working group's agenda, he explained the relationship between his study and the work previously done by Mr. Nicomède Ruhashyankiko in 1978 ("Study on the question of the prevention and punishment of the crime of genocide", E/CN.4/Sub.2/416) and by Mr. Ben Whitaker in 1985 ("Revised and updated report on the question of the prevention and punishment of the crime of genocide", E/CN.4/Sub.2/1985/6 and Corr.1). He pointed out, however, that the working paper was more a pragmatic study than an updating of the previous studies.

25. Mr. Joinet said that he favoured drawing up an inventory of the reference norms and analysing their scope, distinguishing between treaty norms, particularly the Convention on the Prevention and Punishment of the Crime of Genocide, and declarative or jurisdictional statutory norms relating to the question of genocide developed by various international bodies, including the International Court of Justice at the Hague. He had contemplated drawing up a list of the matters that had been omitted from the Convention, which was the first such instrument in the history of the United Nations but which had never been implemented. That Convention constituted a facade, but, in the area of genocide, there was still a juridical vacuum. He then mentioned a number of proposals that had been made with the object of remedying those deficiencies, namely the inclusion of a quantitative criterion in the definition of genocide and extension of the scope of the Convention to various categories of genocide. He had preferred, however, to confine the study to the question of political genocide. At the criminal level, it was desirable to encourage proposals concerning genocide by omission or by complicity and rejection of the doctrine of "owed obedience". States might be made responsible for instituting a juridical basis and establishing an obligation of compensation. Reviewing the accessions to the Convention, he said that 107 States had ratified the instrument; initiatives should be encouraged for the provision of technical assistance to States which had not yet ratified the Convention or which had not taken the legislative steps necessary for its implementation. He suggested that a list should be made of the deficiencies of the Convention in the matter of prevention of genocide.

26. Finally, Mr. Joinet said that priority should be given to measures for encouraging prevention of the crime of genocide, by defining two areas: repressive measures and incentives designed to combat incitement to and provocation of genocide and the role of a working group on prevention of genocide. He emphasized that such a body should be distinct from any international criminal court, which could not function effectively for many years. Such a working group would have both a preventive and a repressive role to play. He referred to the work done by Mr. Cherif Bassiouni on the investigations conducted in the former Yugoslavia. The purpose would be to facilitate the task of a future international jurisdiction. He suggested that the report should be submitted at the next session of the Sub-Commission.

27. Ms. Palley stated that a cautious approach must be taken towards any developments regarding the Genocide Convention. In particular, she emphasized that there was a clear enforcement mechanism embodied within article 9 of the Convention, which outlined the compulsory jurisdiction of the International Court of Justice over cases of genocide. She did not advise revising this mechanism, but she did suggest an additional protocol to the Convention which would expand the definition of the crime of genocide. Ms. Palley stressed, however, that she had doubts even about this second approach, which might, through the creation of categories such as "ethnocide", or even "ecocide", cast doubts upon the strong established jus cogens status of the traditional crime of genocide itself. Ms. Palley concluded by emphasizing the need to encourage States to employ the International Court of Justice in cases of genocide, particularly given the potential for the Court to apply interim measures in such cases.

28. Mr. Guissé said that it was necessary to make progress with regard to the definition of genocide, which had remained the same since 1948, by including in it the concepts of cultural, political and economic genocide. Although genocide was considered a crime against humanity not subject to prescription, that definition had never been given effect. He therefore suggested that consideration of the study should be postponed until the following year, when a second version of the working paper could take those comments into account. He reaffirmed his belief in the need to make progress with the Convention so that it might help to solve the problems encountered at the national level.

29. Mr. Chernichenko supported Ms. Palley's statement and also suggested that the existing concept and mechanism of the Convention should not be revised. An additional protocol could provide for punishment of "ecocide", for example. However, he was against including in the definition the notion that any mass killings constituted the crime of genocide.

30. Replying to an observation by Ms. Palley, Mr. Joinet explained that his statement reflected the issues that could be defined as a result of the questions asked by the Commission, and not his personal opinion, which was that nothing should be done to the 1948 Convention. Making too many changes in order to improve it would, on the contrary, be liable to hamper any positive progress in combating genocide. The pragmatic approach would be to avoid any reform of the Convention and to consider only one or two specific

proposals based on existing initiatives. The Working Group agreed to the proposal to continue consideration of the working paper at the next session in the light of the observations made by members of the Group.

V. JUVENILE JUSTICE

31. At the 1st meeting of the working group, Ms. Gwanmesia, in accordance with the request made by the working group at its 1996 session, presented a working paper on juvenile justice*. She pointed out the main elements of the nature of the juvenile offender and of juvenile justice, following the provisions contained in the relevant international instruments. She especially drew the attention of the working group to the following: (a) the need for a juvenile justice system, in particular the establishment of juvenile courts in each country; (b) custody pending trial; (c) proceedings of trials involving juveniles; (d) sentencing of juveniles; (e) separation of juveniles from adults at all stages. She urged that probation officers be appointed and that special institutions be established for the rehabilitation of juvenile offenders.

32. Ms. Gwanmesia reiterated the recommendations contained in the relevant international instruments, in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). She particularly emphasized three issues: initiatives should be explored to exclude pornographic pictures from the cinema and television because of the harm they might cause to children; the need to indicate in the Convention on the Rights of the Child the respect and love that children owe to their parents; the negative consequences of the involvement in armed conflicts and sex tourism, lack of education and early marriage on the normal development of a child's personality.

33. Mr. Guissé pointed out that the question of defining the age of minority had already been considered in Roman law. He wondered, in fact, whether Ms. Gwanmesia's report did not go beyond the limits of the subject proposed. Juvenile justice was concerned with children who were in conflict with the law or justice. The questions of the parents, exclusion of the press and the personality development of children therefore did not form part of the basic subject, namely "the administration of justice". The improvement of justice could only result from the introduction of rules to protect children in criminal and civil cases, but should not exceed those limits, so as to avoid any conflict with the Convention on the Rights of the Child.

34. Ms. Palley expressed her disagreement with the proposed inclusion in the Convention on the Rights of the Child of the obligation of the child to respect and love the parents. In her view, it was difficult to integrate the issues of the rights of parents and child/parents relations into the Convention, and in any case good emotional relationships could not be legislated.

35. The Chairman-Rapporteur noted that juvenile justice was a prominent subject within the Commission on Human Rights and the Commission on Crime Prevention and Criminal Justice. Therefore, in order to avoid overlapping, the issue needed a very specific mandate in the framework of the working group. He suggested that Ms. Gwanmesia contact those organs and the

Committee on the Rights of the Child, through the Secretariat, for consultation and coordination, and that an inventory of the activities of United Nations bodies in this field should be the focus of the working paper for the next session of the working group. Ms. Gwanmesia underlined that her mandate for the present session was too general to have allowed her to draft a more specific document. The paper for the next session would focus on three issues: preliminary investigation, trial of juveniles and follow-up of the sentence.

36. At the 2nd meeting, Mr. Weissbrodt provided the working group with a document concerning the development of guidelines in order to facilitate the implementation of the provisions of the Convention on the Rights of the Child and to encourage the countries which had not done so to ratify the Convention*. Noting that, up to now, no general comments on the Convention on the Rights of the Child existed, Mr. Weissbrodt recommended that the Committee on the Rights of the Child begin to elaborate comments with the aim of clarifying and concretizing States' obligations under the Convention. He also noted that the Committee had already begun a similar practice by developing a remarkable jurisprudence in its comments on States parties' reports. As regards juvenile justice, one of the main observations made by the Committee was that the Convention's provisions had to be interpreted in the light of other relevant United Nations standards in the field, in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

37. In his document, Mr. Weissbrodt carried out an in-depth analysis of articles 37 and 40 of the Convention on the Rights of the Child with regard to juvenile justice and its administration. In his opinion, taking into account that juveniles deserved a higher level of protection than adults, the Convention indeed provided appropriate safeguards in order to ensure the rights of juvenile detainees. The development of general comments on the Convention would contribute considerably to the general growing awareness of child-related problems, in particular those concerning the field of juvenile justice.

38. Mr. Park, Mr. Joinet, Mr. Alfonso Martínez and Mr. Fan expressed their support and appreciation for Ms. Gwanmesia's study and Mr. Weissbrodt's proposal. In this connection, Mr. Alfonso Martínez stated that Mr. Weissbrodt's proposal should be brought to the attention of the Sub-Commission and eventually transmitted to the Committee on the Rights of the Child. It was decided to keep the issue of juvenile justice on the agenda of the next session of the working group.

VI. PRIVATIZATION OF PRISONS

39. At the 2nd meeting, Ms. Palley introduced her outline on the privatization of prisons, an issue that had been considered by the Sub-Commission since 1988. Noting that the privatization of prisons was gaining ground, Ms. Palley stated that, especially in those countries where corruption was a serious problem, the human rights of detainees could be massively violated and all manner of abuses permitted. The fact that building industry enterprises and security companies were sometimes linked to organized

crime could be seen as an additional element which would definitively worsen the general picture. Noting that the appointment of a special rapporteur had now become advisable, Ms. Palley drew the attention of the working group to five issues: the legality of privatization under international human rights law; the extent of delegation of duties possible under privatization; the question of whether United Nations standards must be further developed; the minimum safeguards required; the most appropriate human rights monitoring method for private prisons.

40. Mr. Alfonso Martínez confirmed that privatization processes applied to the judicial machinery had been a main concern of the Sub-Commission in the 1980s, but because of the historical period no action had been taken since then. Times had changed and this year seemed more propitious for the Sub-Commission to propose the appointment of a special rapporteur who could first refer to the working group and then to the plenary of the Sub-Commission.

41. Mr. Weissbrodt pointed to a recent United States of America Supreme Court decision in which the Court ruled that managers of private detention facilities were ascribed greater civil responsibility than managers of public detention facilities. In Mr. Weissbrodt's view, this decision could have financial implications that would discourage private companies from managing penitentiary institutions.

42. Mr. Guissé expressed his concern that the privatization of prisons could contribute to depriving the State of the responsibility for the administration of civil and criminal justice, which would become ineffective. State control was absolutely necessary in order to guarantee respect for detainees' rights.

43. Mr. Zhong stated that no single formula was feasible on this question because of the differing conditions in countries and issues of sovereignty and rule of law. Therefore, caution was necessary at this stage and the final decision concerning the privatization of prisons should be left to the individual countries' relevant authority.

44. Ms. Gwanmesia believed that the privatization of detention facilities was inconsistent with the texts of several human rights instruments, especially the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which expressions such as "public officials" and "public authority" were used. She questioned the quality of privatized detention facilities, notably with regard to the rights of detained juveniles.

45. Mr. Alfonso Martínez agreed that the question of civil and even criminal responsibility must be included in any study on the subject. He also stressed that, as profits were the ultimate goal of privatization, the rehabilitation of the offender might well suffer in privatized prisons. He proposed that a draft resolution be presented to the Sub-Commission on the subject. This proposal met with the agreement of the group.

46. The working group therefore decided to recommend that the Sub-Commission be authorized to appoint one of its titular experts as a special rapporteur to

undertake an in-depth study on all issues relating to the privatization of prisons, including the possible civil responsibility of enterprises and their employees managing private prisons.

VII. RECOGNITION OF GROSS AND MASSIVE VIOLATIONS OF HUMAN RIGHTS PERPETRATED ON THE ORDERS OF GOVERNMENTS OR SANCTIONED BY THEM AS AN INTERNATIONAL CRIME

47. Mr. Chernichenko introduced his expanded working paper on the subject. The purpose of the paper was to encourage further action against human rights violations, the most dangerous of which were gross and massive violations perpetrated on the orders of Governments or sanctioned by them. The working paper contained a draft declaration declaring this category of human rights violation to be an international crime.

48. Some violations of this type had already been recognized as international crimes, for example, genocide and apartheid. Another step forward should now be taken by proclaiming that all gross and massive violations of human rights perpetrated on the orders of Governments, or sanctioned by them, constituted an international crime. International crime was not a crime in a literal sense of the word, i.e. an act violating criminal law. Rather, it was the most serious violation of international law committed by a State and represented a danger for the entire international community. Any act committed on the order of a Government or sanctioned by it constituted an act of State, which was precisely why the question arose as regards the recognition of gross and massive human rights violations as international crimes.

49. In his paper a "Government" was understood to mean the authorities of the State which acted in its name and were in control of the country. The word "Government" could be replaced by the "ruling power".

50. The working paper did not duplicate the work of the International Law Commission, which dealt with the responsibility of States in general and not with human rights issues. The Commission also dealt with the draft Code of Crimes against the Peace and Security of Mankind, which provided for criminal responsibility of individuals for the commission of a number of acts which threatened the international community.

51. The draft declaration annexed to the working paper did not concern international crimes in general, or the responsibility of States for those crimes; it was also not concerned with the criminal responsibility of individuals who committed the acts threatening the peace and security of mankind. It only stated that a certain category of human rights violations should be recognized as international crimes and should entail the responsibility of those persons who had used a State as a tool to commit them.

52. The draft did not set the task of providing for concrete measures of responsibility and a mechanism for carrying them out. Its goal was rather to proclaim a principle: if we considered that a State should bear the same kind of responsibility for acts it deliberately committed and which represented gross and massive violations of human rights as it bore for aggression, for

example, then we should recognize that those violations are in fact violations of international law of the same character as aggression, in other words, an international crime.

53. The members of the working group, after exchanging opinions on the paper, decided that it could discuss the draft declaration if the continuation of this work were sanctioned by the Sub-Commission. The Sub-Commission could also decide to send the paper directly to the International Law Commission for its information.

54. Mr. Weissbrodt stated that Mr. Chernichenko's important work greatly assisted the group's understanding of relevant aspects of international law, particularly in defining gross and massive violations of human rights. He found the concept of the study very useful. Given the size and importance of the study, however, he proposed discussing the work next year; he also suggested that the study might be forwarded to the International Law Commission, in the hope that it would send comments and advise the working group on how to proceed regarding the issue.

55. Mr. Guissé said that he had been wondering about the size of the study, which was similar to that of a final report. He stressed the need precisely to define the purpose of the study. The subject had already been dealt with by the International Law Commission. The latter's report, which he had examined, proposed that a code of international criminal law should be drawn up. The purpose of developing international criminal law was to establish the responsibility of States, but also that of individuals. In that connection, he recalled the jurisprudence of the Nuremberg Tribunal concerning manifestly unlawful orders and the development, in the 1970s and 1980s, of the concept of international subjectivity, in other words recognition of the individual at the international level. He added that the French Court of Cassation, in its judgement in the Barbie case, had clearly established the principle of responsibility of the individual and the concepts of universal justice and universal competence. He expressed some doubt as to the usefulness of such a study inasmuch as the International Law Commission had already gone deeply into the subject. It was necessary to avoid weakening the scope of the international norm, which had already been considerably reduced by the many reservations entered by States. Those texts would become unnecessary if the Sub-Commission produced a further one. The rule laid down by the French Court of Cassation was sufficiently explicit on the question of the responsibility of the individual before an international criminal jurisdiction.

56. Mr. Park found the working paper very informative and analytical. Nevertheless, he raised some questions about the substance of the study. Concerning paragraph 68, he questioned what procedure could be applied if a State, first, did not voluntarily acknowledge its responsibility and, second, if the international community failed to take coercive measures against the State concerned. Those issues needed further elaboration.

57. Ms. Palley expressed the wish that the Sub-Commission would consider the draft declaration prepared by Mr. Chernichenko, and stated that it was unfortunate that no resources were available for the Sub-Commission to undertake longer studies or papers.

58. Mr. Zhong, thanking Mr. Chernichenko for his work, stated that, in order fully to grasp the study's concepts, the paper should be presented next year, with the author taking into account the comments made during the present meeting.

59. Mr. Chernichenko pointed out that he had been requested by the Sub-Commission to prepare an expanded working paper. He reiterated that his study did not duplicate the work of the International Law Commission.

60. Mr. Joinet pointed out that the Commission on Human Rights regularly emphasized the need for effective cooperation between the various organs of the United Nations. He had therefore thought it wise to submit the document for comment to the International Law Commission, in order that the Sub-Commission might work on it in the following year. It was decided that the procedure to be followed would be the same as that adopted for the document on habeas corpus.

61. The working group recommended the following draft decision to the Sub-Commission:

> "The Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to request the working group on the administration of justice to continue its consideration of the expanded working paper prepared by Mr. Stanislav Chernichenko entitled Recognition of gross and massive violations of human rights perpetrated on the orders of Governments, or sanctioned by them as an international crime (E/CN.4/Sub.2/1997/29) and for this purpose to transmit the expanded working paper, through the Secretary-General, to the International Law Commission, so that the Commission's comments may be considered at the next session of the working group."

VIII. PROVISIONAL AGENDA FOR THE NEXT SESSION

62. At its 2nd meeting, the working group adopted the following provisional agenda for its next session:

1. Election of officers.

2. Adoption of the agenda.

3. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

4. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Summary, arbitrary and extrajudicial executions.

5. Habeas corpus as a non-derogable right [and as one of the requirements for the right to a fair trial].

6. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

7. Juvenile justice.

8. Privatization of prisons.

9. Recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime.

10. Provisional agenda for the next session.

11. Adoption of the report of the working group to the Sub-Commission.

IX. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

63. At its 3rd meeting, on 15 August 1997, the working group unanimously adopted the present report to the Sub-Commission.

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Item 10 of provisional agenda

FREEDOM OF MOVEMENT

Working paper on the right to freedom of movement and related issues prepared by Mr. Volodymyr Boutkevitch in implementation of Decision 1996/109 of the Sub-Commission

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Introduction

1. At its 48th session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, mindful of the links between the protection of minorities, prevention of discrimination, population movements and displacements, freedom of movement, the right to leave and to return to one's own country and the right to seek and enjoy asylum, decided, without a vote, to entrust Mr. Volodymyr Boutkevitch with the task of preparing, without financial implications, a working paper on the right to freedom of movement and related issues and to submit it to the Sub-Commission at its 49th session (decision 1996/109 of the Sub-Commission). In the course of the general debate on the draft text of this decision, the discussion revolved around the words: "working paper on the right to freedom of movement and related issues". The proposals made reduced to giving the task a specific form. In this connection, it was proposed that a member of the Sub-Commission be given the opportunity to work more effectively on the paper.

2. To ensure that the task was carried out effectively, it was proposed that the decision should specifically require the Special Rapporteur to prepare a working paper on the content of the right to freedom of movement, its implementation and the obstacles to implementation, or to examine freedom of movement between States or within the same State. The prevailing view, however, was that greater specificity could be achieved after the discussion of the working paper and that until then the Special Rapporteur should be given a free hand. In the final version of the decision this was reflected in the words "working paper on the right to freedom of movement and related issues".

3. Clearly, on the basis of the text of the decision alone, these related issues include: population movements and displacements, the right to leave and to return to one's own country and the right to seek and enjoy asylum. This list of related issues can be extended by adding those mentioned in Sub-Commission resolution 1996/9 on "The right to freedom of movement", namely: the right of everyone lawfully within the territory of a State to liberty of movement and freedom to choose his or her residence, the prohibition of arbitrary deprivation of the right to enter one's own country and the principle of non-refoulement. The following are also directly related to the right to freedom of movement (regrettably, inasmuch as they deprive populations of that right): forcible exile, mass expulsion and deportation, population transfer, forcible population exchange, unlawful forcible evacuation, eviction and forcible relocation, "ethnic cleansing" and other forms of forcible displacement of populations within a country or across borders.1/

I. THE RIGHT TO FREEDOM OF MOVEMENT AND RELATED ISSUES IN INTERNATIONAL LEGAL INSTRUMENTS

4. The central article on freedom of movement and related issues in the Universal Declaration of Human Rights is, of course, article 13:

1/ See, in particular, Sub-Commission resolution 1996/9.

"1. Everyone has the right to freedom of movement and residence within the border of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country."

5. The following articles of the Universal Declaration throw light on the question of "related issues":

(a) Article 2:

"1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

(b) Article 7:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

This lays down the principle of non-discrimination - the basis of freedom of movement.

(c) Article 3:

"Everyone has the right to life, liberty and security of person."

Freedom of movement is an integral part of the right to liberty.

(d) Article 4:

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

Slavery and the slave trade are inconceivable in the context of the right of everyone to freedom of movement.

(e) Article 8:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The proclaimed right to freedom of movement will be no more than so many words if it cannot be protected in the competent courts or administrative tribunals.

(f) Article 9:

"No one shall be subjected to arbitrary arrest, detention or exile."

Arrest, detention and exile are incompatible with freedom of movement. Exile deprives a person of the right to return to his own country.

(g) Article 10:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

As the Special Rapporteur Mr. Jose D. Ingles himself correctly noted: "This article underlines the right of everyone to a fair and public trial in the determination, among others, of his right to leave any country, including his own, and to return to his country. It should be pointed out that this article aims at having the rights of the aggrieved party determined by an independent and impartial body rather than left to the discretion of a subordinate official".2/

(h) Article 14:

"1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

The broadening of the Sub-Commission's agenda item "Freedom of movement" to include "the right to leave and seek asylum and the right to return" itself indicates that the experts see the right to seek asylum as a very important component of "freedom of movement".

(i) Article 15:

"1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Again, we agree with the conclusion reached by the Special Rapporteur Mr. Jose D. Ingles, namely that: "The right to change one's nationality

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2/ E/CN.4/Sub.2/220, para. 47.

presupposes the right to leave one's country. On the other hand, the guarantee against arbitrary deprivation of nationality ensures one's right to return to one's country".3/

(j) Article 17:

"1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property."

and

Article 19:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Even in ancient times, such fundamental components of the right to freedom of movement as the movement of people, ideas and goods had already been defined. A person cannot take full advantage of the right to leave a country if he is not allowed to take his property with him. The right to leave a country often depends on the recognition of the right to possess property. At the same time, the freedom to seek, receive and impart information, regardless of frontiers, is the freedom of circulation of ideas, a very important constituent of the freedom of movement.

(k) Article 28:

"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

The relationship between this article and article 13 is obvious.

(l) Article 29:

"1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

3/ E/CN.4/Sub.2/220, para. 49.

The article imposes reasonable limitations on the exercise of the right to freedom of movement. Having clearly defined the permissible limitations, it rules out the application of others.

(m) Article 30:

"Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

The article rules out the destruction of freedom of movement on the pretext of having to implement other rights and freedoms.

If article 6 of the Universal Declaration, which gives everyone the right to recognition everywhere as a person before the law, and the other articles of the Declaration are taken into account, then it becomes obvious that practically all its provisions have a bearing on the right to freedom of movement.

6. The most important international legal instrument establishing the right to freedom of movement is the International Covenant on Civil and Political Rights, articles 12 and 13 of the Covenant being the most informative as regards the content of the right to freedom of movement:

Article 12:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country."

Article 13:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

7. However, other articles of the Covenant are equally relevant to the understanding of the right to freedom of movement. Thus, article 2 imposes the obligation on States to respect and ensure this right on the basis of the

principle of non-discrimination, while article 3 requires them to undertake to ensure the equal right of men and women to the enjoyment of freedom of movement. Article 4 of the Covenant on public emergencies allows States to take measures derogating from their obligations under the Covenant only to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and respect the principle of non-discrimination. Article 5 rules out the exercise of other rights and freedoms to engage in any activity or perform any act to the detriment of the right to freedom of movement. An analysis of the other articles of the Covenant reveals that, as in the Universal Declaration of Human Rights, most have a direct or indirect bearing on the right to freedom of movement.

8. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination imposes on States Parties the obligation "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality".

9. Article 10 of the Convention on the Rights of the Child states that:

(1) In accordance with the obligations under the Convention, "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family";

(2) "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2 (opportunity to participate in the proceedings and make their views known - V.B.), States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

10. Article 11 of the Convention requires States Parties to take measures to combat the illicit transfer and non-return of children abroad, by concluding bilateral or multilateral agreements or acceding to existing agreements.

11. A number of universal international agreements establish recognized standards relating to the right to leave a country and return to it, entry and departure, within their specific areas of competence. Thus, for example, article 44 of the Vienna Convention on Diplomatic Relations states: "The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons, irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property". Similar provisions can also be found in the Vienna Convention on Consular Relations.

12. The Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character also focuses on these questions, as evidenced by just three articles singled out from among numerous other provisions:

Article 26 - Freedom of movement

"Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to its members of the mission and members of their families forming part of their households."

Article 79 - Entry into the territory of the host State

"1. The host State shall permit entry into its territory of:

(a) members of the mission and members of their families forming part of their respective households;

(b) members of the delegation and members of their families accompanying them, and

(c) members of the observer delegation and members of their families accompanying them.

2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1 of this article."

Article 80 - Facilities for departure

"The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the

host State, and members of the families of such persons irrespective of their nationality, to leave its territory".4/

13 Our notions concerning the regulation of the universal right to leave a country, including one's own, and return to one's country can be considerably expanded by taking into consideration the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984,5/ the Convention on Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930, the Protocol concerning a Specific Case of Statelessness of 12 April 1930, the Special Protocol concerning Statelessness of 12 April 1930,6/ the Convention relating to the Status of Stateless Persons of 28 September 1954, the Convention on the Nationality of Married Women of 29 January 1957, the Convention on the Reduction of Statelessness of 30 August 1961, the Statute of the Office of the United Nations High Commissioner for Refugees of 14 December 1950, the Convention relating to the Status of Refugees of 28 July 1951, the Protocol relating to the Status of Refugees of 31 January 1967, the Declaration on Territorial Asylum of 14 December 1967, the Conclusions of the Executive Committee of the Office of the United Nations High Commissioner for Refugees,7/ the Agreement relating to Refugee Seamen of 24 November 1957, the Protocol relating to Refugee Seamen of 12 June 1973, etc.

14. Despite the proposals to consider the "Situation of migrant workers and members of their families" under item 3 "Comprehensive examination of thematic issues relating to the elimination of racial discrimination" of the Sub-Commission's agenda and not under item 10 "Freedom of movement", it is impossible to make a thorough study of population displacements and the right to leave and seek asylum and the right to return without taking into account the instruments of international law that regulate migration. Therefore, irrespective of whether the agreement has entered into force or not and is binding or merely makes recommendations, in order to understand the right to freedom of movement it is important carefully to analyse the provisions of the

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4/ United Nations Juridical Yearbook, 1975, New York, 1977, pp. 129, 151-152.

5/ See, for example, article 3 on the expulsion, return or extradition of a person to another State.

6/ Has not entered into force.

7/ See, for example, Conclusion No. 7 (XXVIII) - Expulsion, 1977; Conclusion No. 8 (XXVIII) - Determination of Refugee Status, 1977; Conclusion No. 15 (XXX) - Refugees without an Asylum Country, 1979; Conclusion No. 22 (XXXII) - Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981; Conclusion No. 30 (XXXIV) - The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 1983; Conclusion No. 39 (XXXVI) - Refugee Women and International Protection, 1985; Conclusion No. 40 (XXXVI) - Voluntary Repatriation, 1985; Conclusion No. 44 (XXXVII) - Detention of Refugees and Asylum-Seekers, 1986; Conclusion No. 58 (XL) - Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection, 1989; etc.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, ILO Convention (No. 97) concerning Migration for Employment (Revised) of 1 July 1949, ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security of 28 June 1962, ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of 24 June 1975, ILO Recommendation (No. 86) (Revised) concerning Migration for Employment of 1 July 1949, ILO Recommendation (No. 151) concerning Migrant Workers of 24 June 1975, etc.

15. The examination of this question reveals that as far as freedom of movement is concerned important progress has been made in the matter of its regulation by international law, and not only at the universal level. A positive approach to freedom of movement and, in particular, to the right to leave a country and return has also been adopted in almost all the regional human rights instruments. In confirmation of this it is customary to cite Protocol No. 4 of 16 September 1963 to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, Article VIII of the 1948 American Declaration of the Rights and Duties of Man, Article 22 of the American Convention on Human Rights of 21 November 1969, Article 12 of the African Charter on Human and People's Rights of 27 June 1983, and the Final Act of the Helsinki Conference on Security and Co-operation in Europe and its follow-up documents.

16. However, not only in these but also in other regions many more international legal instruments which directly or indirectly concern the right to freedom of movement have been drawn up and put into effect. Underestimating them could affect the depth of the analysis of the problem as a whole. Thus, for example, in investigating these questions, in relation to the European region alone, there are dozens of recommendatory instruments which should be taken into account. These include Protocol No. 7 of 22 November 1984 to the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms, the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 6 May 1963, the Protocol of Amendment to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 24 November 1977, the Additional Protocol to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 24 November 1977, the Second Protocol of Amendment to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 2 February 1993, the European Agreement on the Abolition of Visas for Refugees of 20 April 1959, the European Agreement on Transfer of Responsibility for Refugees of 16 October 1980, Recommendation of the Assembly of the Council of Europe 773 (1976) concerning de facto Refugees, Recommendation of the Assembly of the Council of Europe 817 (1977) concerning the Right to Asylum, the 1977 Declaration of the Committee of Ministers of the Council of Europe on Territorial Asylum, Recommendation of the Committee of Ministers of the Council of Europe R (1981) 16 on the Harmonization of National Procedures relating to Asylum, Recommendation of the Committee of Ministers of the Council of Europe R (1984) 1 on the Protection of Persons not Formally Recognized as Refugees, the Convention determining the State responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities of 15 June 1990, the Agreement establishing a European Union of 7 February 1992, the European Convention on Establishment of 13 December 1955,

the European Social Charter of 18 October 1961, the European Convention on Social Security of 14 December 1972, the European Convention on the Legal Status of Migrant Workers of 24 November 1977, the Agreement establishing a European Economic Community of 25 March 1957, Directive of the Council of the European Economic Community 64/221 of 15 February 1964 on the harmonisation of special measures relating to the movement and residence of foreign nationals, the Regulation of the Council of the Economic Communities 1612/68 of 15 October 1968 on the freedom of movement of workers with amendments introduced by Regulation 312/76 of 9 February 1976, Directive of the Council of the European Communities 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community, Regulation of the Commission of the European Communities 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State, Directive of the Council of the European Communities 73/148 of 21 May 1973 on the abolition of restrictions on the movement and residence within the Community of nationals of Member States in connection with establishment, entrepreneurial activities and the provision of services, the European Agreement of 13 December 1957 on Regulations Governing the Movement of Persons between Member States of the Council of Europe, the Convention on the Participation of Foreigners in Public Life at Local Level of 5 February 1992, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Controls at the Common Frontiers (Schengen Agreement) of 14 June 1985, the Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Controls at the Common Frontiers of 19 June 1990, etc.

17. The fact that these and other instruments were not duly reflected in the reports of Mr. Jose D. Ingles and Mr. C.L.C. Mubanga-Chipoya is not the only reason why they should be examined. Firstly, many of the instruments listed and others not mentioned were adopted after the corresponding studies had been carried out and, naturally, were not considered by the Special Rapporteurs. Secondly, international legal sources often solve the same problems in different ways. Thus, for example, in the Universal Declaration of Human Rights it is stated that "Everyone has the right to freedom of ... residence within the border of each State", while according to the International Covenant on Civil and Political Rights "everyone lawfully within the territory of a State shall, within that territory, have ... freedom to choose his residence". At the same time, the International Convention on the Elimination of All Forms of Racial Discrimination merely guarantees everyone the right to "residence within the border of the State".

18. Of course, the existence of different approaches to the same legal situation allows States to choose to be guided by those principles which are least detrimental to themselves rather than to the individual, and in fact this can give rise to discrimination against the individual. Thirdly, the mandate of Mr. Jose D. Ingles included studying discrimination in respect of the right provided for in article 13, paragraph 2 of the Universal Declaration of Human Rights. The Special Rapporteur Mr. C.L.C. Mubanga-Chipoya was instructed to "prepare an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country, and to have the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into

account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights".

19. In fact, the mandate of the Special Rapporteur remained essentially unchanged, comprising the same article 13, paragraph 2 of the Universal Declaration of Human Rights plus the brain drain problem and a reference to article 12, paragraph 3 of the Covenant, where the permissible restrictions are listed. The Sub-Commission's agenda item "Freedom of movement" now includes, in addition to "the right to leave" and "the right to return", "the right to seek asylum". This right is provided for in article 14 of the Universal Declaration where it is stated that everyone "has the right to seek and to enjoy in other countries asylum from persecution", but with the important restriction that this right "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". However, the International Covenant on Civil and Political Rights does not have any similar provisions. And since in fact they went beyond the scope of the mandates of the Special Rapporteurs, they were not studied comprehensively or in depth.

II. RIGHT TO FREEDOM OF MOVEMENT AND RELATED ISSUES AT NATIONAL LEVEL

20. As noted by the Special Rapporteur Mr. Jose D. Ingles, in 1963 in only 24 countries were the right of a national to leave his country and the right of a national to return to his country officially recognized in the constitution or the legislation. In another 12 countries these rights were recognized in judicial practice. In only 20 countries did the constitution or the law officially recognize the right of a foreigner to leave his country of residence. In 4 more countries this right was recognized in judicial practice. A number of countries which did not have any constitutional or legislative provision or judicial precedent governing this question said that they recognized the right "in principle", "as a rule of law", "in general practice", "according to regulations", "as an enforceable right", "always", or that "there is no authority for denial". This was particularly true as regards the right of a national to return to his country, which had thus been informally recognized by 16 additional countries. True, the Special Rapporteur also stressed that: "it is necessary to probe more deeply into the actual situation before drawing any conclusions in this matter. The formal recognition of a right is not enough to ensure its enjoyment. The law or practice may hedge the right with so many conditions as to whittle it away or render it nugatory" (E/CN.4/Sub.2/220, paras. 16 and 17).

21. As regards the solution of problems of freedom of movement, the Special Rapporteur Mr. C.L.C. Mubanga-Chipoya concentrated his attention on questions of the participation of the State in the Internationcal Covenant on Civil and Political Rights. He also selectively considered the laws and administrative regulations of certain countries in relation to this matter. In general, however, his study was based on the replies of countries to the questionnaire he compiled. Not all these replies reflected the true state of affairs, some merely depicting a desired situation. Thus, "according to the reply of the Union of

Soviet Socialist Republics to the Special Rapporteur's questionnaire, Decree No. 163 of the USSR Council of Ministers of 28 August 1986 introduces in the Statute on entry into the USSR and departure from the USSR of 1970 several new and important provisions. The possibilities of entry and departure are provided to Soviet citizens, foreign citizens and stateless persons 'irrespective of origin, social and property status, race or nationality, sex, education, language or religious attitudes'" (E/CN.4/Sub.2/1988/35, para. 224). In reality, however, in the Soviet Union at the time the Special Rapporteur was completing his final report, citizens of the USSR could depart, say for the United States or a country in Western Europe, only with the permission of the administration at their place of work and the appropriate Communist Party committee.

22. In fact, there has since been a radical change in the legislative situation in the region, but this did not materialize until after the Special Rapporteur C.L.C. Mubanga-Chipoya had finished his work. Naturally, these changes could not have been studied by the Rapporteur. When compared with the existing international standards, some of the changes must be considered positive and others negative. The breakup of the Soviet Union led to the appearance of 15 new States on the world map and in more or less five years these created their own legislation, including laws dealing with questions of freedom of movement and related issues. In most of the countries of the region freedom of movement is guaranteed by the constitution,8/ while in some countries separate laws have been adopted. Admittedly, the constitutional freedoms are often hedged around with laws and administrative regulations which still require registration ("propiska"). The extent to which these constitutional guarantees encourage the assertion of the principle of freedom of movement in the countries of the region or merely shroud the situation in a legislative fog will become clear in the process of investigating the problem. Similarly, only by close study is it possible to tell whether or not discrimination is introduced when a State adopts a law on freedom of movement that applies only to its own nationals. Thus, for example, in 1993 Russia adopted a Law of the Russian Federation "On the right of citizens of the Russian Federation to freedom of movement and to choose their place of residence and abode within the Russian Federation".

23. The active law-making in the countries of the region suggests that many States have taken the results of the study made by the Special Rapporteur Mr. C.L.C. Mubanga-Chipoya into consideration in their enactments. At the same time, not all the legislation takes into account the concerns of the Rapporteur or draws the appropriate conclusions from the recommendations made in the course of the discussion of both the report and the draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. After proclaiming their sovereignty and independence, the States of the region have not always adopted the recognized international standards as far as freedom of movement and related issues are concerned. While endeavouring objectively to regulate the status of nationals and foreigners, they have not been able completely to avoid legislative discrimination, not only with respect to the "national-foreigner" dichotomy but also among nationals and foreigners themselves. As a result, the

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8/ See, for example, article 33 of the Constitution of the Ukraine.

mistakes have had to be corrected in supplementary legislation, often under pressure from an aroused public. In the rush, the new laws adopted have not always come up to generally accepted standards. Sometimes they have even further confused the legal situation of the individual.

24. The mere enumeration of some of the legislation shows how complicated it can be to understand how the right to freedom of movement and related issues are regulated in the countries of the region. These questions are dealt with in: (a) the various national constitutions (all adopted after the completion of the special report); (b) the nationality laws (all the laws on nationality, like the other laws of the countries of the region relating to freedom of movement, were adopted after the completion of the Special Rapporteur's report and the draft declaration); (c) the laws on refugee status (for example, Azerbaidjan, 1992; Belarus, 1995; Latvia, 1995; Russia, 1993; Tadjikistan, 1994, Ukraine, 1993, etc.); (d) the laws on forcible relocation (for example, Azerbaidjan, 1992; Russia, 1995, etc.); (e) the laws on the State language (Azerbaidjan, 1992; Moldova, 1989; Uzbekistan, 1995, et al.) and language laws (Armenia, 1993; Latvia, 1992; Moldova, 1989; Ukraine, 1989; Estonia, 1995, etc.); (f) the laws on the legal status of foreigners (Armenia, 1994; Belarus, Georgia, Turkmenistan, Estonia, 1993; Kazakhstan, 1995), the laws on the status of citizens of the USSR in a State that has proclaimed its independence (for example the Latvian law of 1995), the laws on the legal status of foreign nationals and stateless persons (Moldova, 1994); the laws on the legal status of foreign nationals and residence laws for foreigners (Kyrgyzstan, both in 1993; Latvia, 1992, etc.); (g) the laws on national minorities (Belarus, 1992; Latvia, 1991; Ukraine, Estonia, 1993, etc.); (h) the laws on the procedure for entry and departure: (i) of nationals (Belarus, 1993; Russia, 1991; Turkmenistan, 1995; Ukraine, 1994, etc.); of nationals and foreigners (Moldova, 1994); of foreigners (Georgia - on temporary entry, residence and departure, 1993); on the entry and residence of foreign nationals and stateless persons (Kyrgyzstan, 1993), etc.; (j) the laws on migration (for example, Moldova, 1990), on emigration (Georgia, 1993; Latvia, 1991, etc.), on immigration (Georgia, 1993; Kazakhstan, 1992; Lithuania, 1991, etc.), on forced migrants (for example, Tadjikistan, 1994) and forcible relocation (Russia, 1995); (k) the laws on freedom of movement and residence (for example, Russia, 1993), etc.

25. These pieces of legislation often differ with respect not only to the terminology employed and the category of people included but also in their treatment of nationals, foreigners and stateless persons as regards the right to freedom of movement and choice of residence, which is often inconsistent with international standards and sometimes discriminatory. As these are questions which were not and could not have been investigated by the Special Rapporteur C.L.C. Mubanga-Chipoya, it is a matter of particular urgency that they be investigated today, since these problems of the region affect not only the peace and security and human rights situation of Europe but that of the world community as a whole.

26. The report of the Special Rapporteur did not reflect the situation in the countries of the former Yugoslavia. Many of the gaps in the report were filled in by the Sub-Commission on Prevention of Discrimination and Protection of

Minorities,9/ the Commission on Human Rights, and the Economic and Social Council. However, there has been no special analysis of the question of discrimination in respect of the right to freedom of movement and related issues in the legislation of the States of the former Yugoslavia.

27. In a number of instances, the conclusions and proposals of the Special Rapporteur were descriptive in nature with respect to countries and regions, did not deal at all with the provisions of the national legislation or are today clearly out of date. The weakest point of the special report is, in our opinion, the section on "Restrictions on entry imposed by national legislation" (E/CN.4/Sub.2/1988/35, paras. 355-381). With a minor exception, the questions relating to this aspect were either not investigated at all or mentioned in passing with reference to the replies of governments or the well-known restrictions of article 12, paragraph 3 of the International Covenant on Civil and Political Rights. Meanwhile, the conclusions of the Special Rapporteur, based on an analysis of the legislation, have proved short-lived either because the States and their legislation have disappeared (USSR, Yugoslavia, Czechoslovakia) or because the laws on which his conclusions rested have been abolished and the new legislation takes a different approach to the problems he raised.10/

28. In many cases, if the problems of freedom of movement were not explored comprehensively and in-depth by the Special Rapporteur, this was not his fault. His mandate was restricted to "the right of everyone to leave any country, including his own, and to return to his country". At the time of the study, the topics "departure" and "return" were in fact the main issue as far as the exercise of the right to freedom of movement was concerned. The ideological considerations by which the former socialist countries were guided made freedom of movement unrealistic and its "implementation" could be reduced merely to the formal assertion of the corresponding principle in the legislation. Today, now that the countries of the socialist system have switched to building democratic societies, the situation has radically changed. In circumstances in which freedom of movement is guaranteed by law but economic crisis, interethnic conflict and civil war prevail, the central problem is no longer "departure" and "return" but "entry" and "non-return". Today, the special report and the draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country both need rethinking and further study.

9/ See, for example, resolutions 1995/10 and 1996/2 ("Situation of human rights in Kosovo"), resolution 1995/1 ("Expression of solidarity with the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, Mr. Tadeusz Mazowiecki"), resolution 1995/8 ("Situation in the territory of the former Yugoslavia"), resolution 1995/13 ("The right to freedom of movement"), etc.

10/ See, for example, the corresponding provisions of the French legislation.

III. THE SITUATION DURING THE LAST TEN YEARS

29. Since Mr. C.L.C. Mubanga-Chipoya completed his report on "The right of everyone to leave any country, including his own, and to return to his country" the situation with respect to the assertion and implementation of both that right and the right to freedom of movement in general has fundamentally changed. In Europe alone, the Berlin Wall has been torn down, the Soviet Union and Yugoslavia have broken up, and Czechoslovakia has split in two. Interethnic conflicts and civil war have rolled through Europe, Asia, Africa and Latin America. These events, together with the liberalization of border-crossing procedures in the countries of Eastern Europe, have resulted in an intensification of migratory processes, an increase in the number of refugees, displaced and relocated persons, etc. In many countries, the right to freedom of movement has effectively been replaced by an enforced lack of freedom to move or flee. In a number of countries, there is such a wide variety of migrants and refugees that it is often difficult to "squeeze" them into the existing international standards.

30. Thus, in the countries of Eastern Europe, migrants are divided into internal and external. Internal migrants are divided into natural and environmental (especially numerous after the earthquake in Armenia, Chernobyl in the Ukraine, and the drying up of the Aral Sea in Central Asia). In the countries formed after the breakup of the Soviet Union, among the external migrants it is possible to distinguish: (a) those returning to their mother country from former Soviet republics (repatriates); (b) those illegally deported on the basis of their nationality; (c) migrants from the "near abroad" forced to leave their country of residence; (d) refugees from the "far abroad"; (e) illegal migrants from the "far abroad"; (f) transiting illegal migrants.

31. Since this classification is not always consistent with the existing international standards and since each subdivision of the classification is being quite actively dealt with in the legislation, in practice cases of not only de facto but also legislative (legal) discrimination are commonly encountered. As one progresses along the scale from repatriates to transiting illegal migrants, the legal safeguards become feebler and discrimination increases with respect to practically all the criteria in relation to which discrimination is prohibited in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

32. In the Eastern European region, especially on the territory of the former Soviet Union, where even in the eighties leaving the country was a major problem, huge waves of migration are almost overwhelming the efforts of the authorities to regulate the process. The conflicts in Armenia, Azerbaidjan, Georgia, Moldova, Northern Ossetia, Tadjikistan, Chechnya and especially on the territory of the former Yugoslavia have generated equally massive flows of refugees. The streams of refugees and the flood of migrants have together created enormous waves of displaced people which have not only rolled through the European continent but have also affected the United States, Canada and countries on other continents.

33. In their attempts to halt or slow these movements, countries have tightened up their legislative requirements with respect to refugees and migrants, which has led to an increase in the numbers of illegal migrants and

refugees. To combat this, ever stricter amendments have been introduced into the legislation, as a result of which in some countries it has become problematic to speak not only of the right to freedom of movement but even of respect for the dignity of persons crossing the border.

34. An important factor in this process is the reaction of the population of the countries to which the refugees and migrants have moved. In the former socialist countries, which had previously attracted hardly any foreigners intending to stay for a more or less extended period of time, the changed situation has generated the new, previously unknown problem of the adaptation of refugees and migrants to local conditions and the local population's perception of them. One of the students of this process in the territory of the former USSR notes that: "The mass media view the arrival of foreigners from the far abroad (countries outside the former USSR - V.B.) in the territory of these countries (former republics of the USSR - V.B.) as a problem that poses a threat. They hardly ever present it in a humanitarian-humanistic light. ...In the regions which accept migrants, the attitude towards them may vary from tolerance through indifference to suspicious xenophobia and downright hostility."11/ Of course, this is still no Yugoslav-type "ethnic cleansing", but it is far from being the result of freedom of movement. The same author suggests that since in these regions no one is analysing the attitude of the local population to foreigners (migrants), the problem of xenophobia and even hostility may come as a surprise to the public and especially the authorities.

35. The countries formed on the territory of the former USSR face the novel problem of transiting illegal migrants from the countries of South-West Asia, Africa and the Middle and Near East who, taking advantage of the liberalization of the region's border regimes, are trying to reach the countries of Western Europe. The Ukrainian media report that, in 1995, 18.2 million foreigners entered Ukraine while only 17.4 million left, i.e. 800,000 remained in the country. Only half that number registered with the authorities. The Russian media report 12/ that the country has about 500,000 illegal migrants. Failing to find understanding on the part of the authorities and the population and feeling themselves rejected by the local community, the illegal migrants turn to crime, which reinforces the hostile-xenophobic attitude towards them. The circle is closed. In the Ukraine alone, in 1995, administrative proceedings were taken against 70,000 foreigners from more than 100 countries. One in every seven was expelled from the country for crossing the border illegally 13/. However, the foreigners themselves do not want to remain in Eastern Europe. Their main aim is to cross into the countries of Western Europe.

36. This has begun to develop into an illicit business. Fake travel agencies, joint enterprises, commercial establishments and limited-liability companies are being set up for this purpose. Criminal business organizations have turned human beings into merchandise. Their development has already reached the stage of

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11/ Mikola Shul'ga, Zovnishnya migratsiya v Ukraini: napryam, sklad, masshtabi, "Prava lyudini v Ukraini", Kiev, 1996, No. 17, pp. 13-14.

12/ "Izvestiya", 7 July 1994.

13/ Mikola Shul'ga, ibidem, p. 18.

"specialization". Thus, a Ukrainian-Pakistani firm "Radzha-interpraiz" registered in Kiev specialized in preparing false travel documents for foreigners and sending them to the West. The Israeli firm "Novyi gorizont" transported illegal migrants whom it passed off as students at a Ukrainian educational institution. Whereas in 1992 only five such groups were discovered in the Ukraine, by 1994 the number had risen to 78, and in 1995 91 were exposed in the first six months alone.14/ In transporting foreigners across the border the criminal groups show less concern for them than they would for a load of goods. In 1996, a refrigerator truck transporting Chinese nationals was stopped at the State frontier between Ukraine and Slovakia. Out of the 40 people detained 10 were suffering from severe frostbite and needed resuscitation.

37. Little has changed in the countries of the region with respect to the right to freedom of movement, even for the local population. Even in those countries in which the right to freedom of movement is embodied in the constitution or the law, it is not easy to exercise in practice. On 25 June 1993, Russia adopted the Law "On the right of citizens of the Russian Federation to freedom of movement and to choose their place of residence and abode within the Russian Federation". However, as noted by the investigator of the Russian passport and permit systems K. Lyubarskii, "In actual fact, this law is without effect in the Russian Federation. Throughout Russia, as before, the police continue to inssist that citizens comply with the registration requirements. The situation is especially acute in Moscow, where the Mayor of Moscow, Yu. Luzhkov, has signed an order introducing "Temporary regulations concerning the special procedure governing the residence in the city of Moscow - capital of the Russian Federation - of citizens living permanently outside Russia". Under this order, which consists of 27 paragraphs, on 15 November the city introduced a "special residence regime", in accordance with which all citizens of countries of the near abroad staying in the capital for more than 24 hours must register and pay a fee equivalent to 10% of the Russian minimum wage. Anyone failing to register is promised a fine of three to five times the minimum wage with 50 times the minimum wage for repeat offenders plus expulsion from Moscow, either at their own expense or at the expense of Moscow Police Headquarters.

38. Similar measures have been introduced by the Mayor of Saint Petersburg, A. Sobchak, and by the administrations of a number of other administrative units. All these orders are contrary not only to the federal law on freedom of movement but also to article 27 of the new Constitution of the Russian Federation. "Since citizens of the CIS are covered by an agreement which provides for them to enter Russia without visas, the orders of the two mayors are not only unlawful but also unconstitutional".15/

39. The right to freedom of movement is more than just the right to cross the border. It is also the right to normal living conditions in the country of residence. Meanwhile, according to the Committee of Afghan Emigrants in the Ukraine, Afghans have no housing, no medical care, and no possibility of being placed in suitable jobs, obtaining special assistance, obtaining the passports to which under the legislation and international law they are entitled in order

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14/ Ibidem, p. 19.

15/ "Novoe vremya", 1994, No. 2.

to enjoy normal living and working conditions, or obtaining the right to travel freely. The Afghan emigrants complain about the lack of security. They are often subjected to attacks by individual thugs and gangs, both where they live and where they work. "We do not even have the right to go out on the street - they write - or buy bread freely. In other countries, regardless of nationality, origin, colour or language, people can turn to the authorities when they are in trouble. The police protect them and treat them as free and protected people. But in the Ukraine we cannot turn to the law enforcement services. If we do, they insult and humiliate us, beat us or send us to prison for at least 7 or even 30 days. After that they kick us out. If we are registered, they cancel our registration or just give us a visa for 30 days with a warning. If we are unable to leave the country, we go back to jail and nobody can get us out. Every refugee knows this. In spite of our political, economic and social difficulties, they fine us on every street corner, or we must pay the policeman a bribe."16/ Even if this testimony is emotionally exaggerated, it certainly illustrates how difficult it is for foreigners to be accepted by and adapt to the local community. Unfortunately, similar complaints can be heard in many countries of the region, even those considered to be well off from the liberal, economic, social and political points of view.

40. In the territory of the former Yugoslavia the situation as regards respect for the right to freedom of movement is even worse. As noted by the Special Rapporteur of the Commission on Human Rights, Ms. Elizabeth Rehn, in the periodic report "Situation of human rights in the territory of the former Yugoslavia", the Dayton Agreement "expressly commits the parties to ensuring freedom of movement and incorporates international law guaranteeing this right. ... Nevertheless, restrictions on movement are common in Bosnia and Herzegovina, particularly along the Inter-Entity Boundary Line (IEBL) but also between territories controlled by Bosniak and Bosnian Croat authorities within the Federation. Federation traffic between Sarajevo and Gorazde, passing through Rogatica and crossing territory under Republika Srpska administration, remained at great risk at the end of 1996. ... The Special Rapporteur is deeply concerned about arrests of travellers for alleged complicity in war crimes, which have sometimes been made with little apparent basis and in violation of provisions of the so-called "rules of the road" agreed to by the parties at Rome in February 1996. Under that agreement, non-indicted war crime suspects are to be held only following notification by the International Criminal Tribunal at The Hague that a basis for such detention exists. Arrests violating this agreement have caused great fear on both sides of the IEBL and imperilled freedom of movement throughout Bosnia and Herzegovina. ... Prospects for returns to the ZOS have been seriously damaged by the wide-scale deliberate destruction of abandoned homes. ... Within the Federation also, returns have been obstructed by the deliberate destruction of homes, particularly in Bosnian Croat controlled territory. ... Bombings of Croat-owned homes were reported in the Bosniak-controlled towns of Konjic and Vares".17/

41. These violations of the right to freedom of movement are also typical of other regions. Since the Special Rapporteur C.L.C. Mubanga-Chipoya completed his

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16/ "Prava lyudini v Ukraini", Kiev, 1996, No. 17, p. 129.

17/ E/CN.4/1997/56, paras. 8, 9, 12, 17 and 19.

report, the implementation of the right to freedom of movement has improved in some respects but, unfortunately, worsened in others. Thus, the Special Rapporteur noted the following trend: "From the time when Mr. Ingles finished his report the universal understanding and recognition of the right to leave and return among individuals and Governments has increased."18/ Although this assertion was made with extreme caution ("among individual States and governments" [sic]), today, unfortunately, it needs to be made more specific: understanding of the right to leave and return to one's own country has increased. As far as entering another country is concerned, the visa issuing procedures have, unfortunately, become more complicated, to such an extent that if States do not relax the existing regimes, the right to freedom of movement as a whole may be placed in jeopardy.

42. The Special Rapporteur C.L.C. Mubanga-Chipoya was overoptimistic when he concluded that: "Freedom of movement within the country ... has progressed substantially and only a few examples could be mentioned of the limitation of this freedom."19/ The concepts of "protection of national security", "protection of public order", "protection of public health and morals" and "protection of the rights and freedoms of others" still need to be defined more precisely. These concepts, which comprise the permissible restrictions, are often interpreted and used for the purpose of suppressing freedom of movement. For the most part, the definitions proposed by the Special Rapporteur in the draft Declaration were rejected by governments.

43. The Special Rapporteur correctly noted that: "The right to leave is directly dependent on the ability or possibility to enter another country. Indeed, for them to be effective, both these aspects of the freedom of international movement should be addressed and settled at one and the same time. States should be encouraged to take international and regional measures and to reduce the necessity for entry visas on temporary visits. All forms of discrimination in this respect should be eliminated."20/ Unfortunately, this appeal of the Special Rapporteur's is even more pertinent today. Little progress has been made in fulfilling the Special Rapporteur's wishes with regard to migrant workers, the "brain drain", family reunification, refugees, etc. In his view, "the recourse procedures included in national legislations should be left to independent judicial or non-judicial bodies". Unfortunately, a new study of this area might well lead to the same desire again being expressed.

IV. CONCLUSIONS AND PROPOSALS

44. In 1954, at its 6th session, the Sub-Commission decided to place on the agenda the question of the procedure to be followed in studying discrimination in the fields of emigration, immigration and travel. The Special Rapporteur Jose D. Ingles was appointed and in 1960, after a lengthy process of definition of the subject of the study, began to analyse discrimination in respect of the

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18/ E/CN.4/Sub.2/1988/35, para. 508.

19/ E/CN.4/Sub.2/1988/35, para. 512.

20/ Ibidem, paras. 524, 525, 526.

right of everyone to leave any country, including his own, and return to his country, as provided in article 13, paragraph 2 of the Universal Declaration of Human Rights.

45. In 1962, Jose D. Ingles completed his "Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" and drew up the "Draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country". The Sub-Commission submitted the report and the draft principles to the Commission on Human Rights and at its 17th-21st sessions inclusive expressed the hope that the Commission would take the initiative in completing the consideration of the report prepared by Jose D. Ingles and the draft principles approved by the Sub-Commission.

46. At its 20th to 24th sessions inclusive the Commission postponed the discussion of the agenda item relating to this study. It was included in the agenda of the 25th-29th sessions of the Commission on Human Rights but considered only in 1973. The Commission did not take any substantive measures. On 18 May 1973, in resolution 1788 (LIV) ECOSOC instructed the Commission on Human Rights to consider the question of the right of everyone to leave any country, including his own, and to return to his country at three year intervals coinciding with its discussion of the periodic reports on civil and political rights.

47. At its 35th session, the Sub-Commission appointed Mr. C.L.C. Mubanga-Chipoya to prepare an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country, and to have the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights. The Sub-Commission considered the report and the draft declaration at its 40th session. In resolution 1989/25 of 31 August 1989, the Sub-Commission expressed its appreciation and thanks to the Special Rapporteur, Mr. Mubanga-Chipoya, for the important contribution he had made to the legal doctrine relating to the right of everyone to leave any country, including his own, and to return to his country. At its 42nd session, the Sub-Commission decided to establish a sessional open-ended working group, representing the various regional groups, with a view to preparing a revised version of the draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country.

48. At the Sub-Commission's 42nd session, the sessional open-ended working group discussed the question of the scope of application of the draft declaration, articles 1 and 2, and the formulation of articles 1-4 of the draft. At the Sub-Commission's 43rd session, the working group discussed the new consolidated draft declaration and decided to use the session to identify the main areas of dispute. On 29 August 1991, the Sub-Commission decided to transmit to the Commission on Human Rights the report of the 1991 session of the Working Group on a draft declaration on the right of everyone to leave any country, including his own, and to return to his country, inviting the Commission to

provide comments and guidance on the issues mentioned in the report. At its 48th and subsequent sessions, the Commission took no decisions with respect to this question.

49. At its 44th session, the Sub-Commission decided to include in the provisional agenda of its 45th session an agenda item provisionally entitled "Freedom of movement". At its 45th session the Sub-Commission decided to include in the agenda of its 46th session under the item on freedom of movement a sub-item on the situation of migrant workers and members of their families. In accordance with the draft provisional agenda of the 49th session of the Sub-Commission, it is proposed that this sub-item be excluded from the item on freedom of movement and considered together with the sub-item "xenophobia" under the item "Comprehensive examination of thematic issues relating to the elimination of racial discrimination". At the same time, at its 46th session, the Sub-Commission decided to include in the agenda item entitled "Freedom of movement" the sub-item "Population displacements".

50. At its 2nd meeting on 6 August 1996, the Sub-Commission decided to add to its agenda a new sub-item 18 (c) entitled "The right of everyone to leave any country, including his own, and to return to his country". The Chairman of the Sub-Commission, in collaboration with the Secretariat, completed the preparation of the draft provisional agenda for the Sub-Commission's 49th session, item 10 of which was worded as follows: "10. Freedom of movement: (a) population displacements; (b) the right to leave and seek asylum and the right to return". This item was to be considered once every two years, starting in 1997.

51. In the course of the 45 years since the Sub-Commission's 5th session the problems of freedom of movement have been discussed at its sessions. Various proposals have been made with respect to the agenda as it relates to this question and the discussions have taken various directions. Initially, Mr. Meneses-Pallares proposed the consideration of "discriminatory practices in the field of migration". However, the Sub-Commission chose to study "measures to combat discrimination, including in the field of immigration and travel". At its 6th session (1954), the Sub-Commission decided to carry out studies of "discrimination in the matter of emigration, immigration and travel". Then the Commission on Human Rights recommended that a study of "discrimination in the matter of emigration and the right to return to one's country as provided in paragraph 2 of article 13 of the Universal Declaration of Human Rights" be undertaken and that "immigration and travel" be deleted from the agenda. The Economic and Social Council requested the Sub-Commission to study only paragraph 2 of article 13 of the Universal Declaration of Human Rights, after excluding discrimination in the matter of emigration.

52. The Sub-Commission proposed that ECOSOC should take a decision that did not prevent the study of the question of discrimination in the field of immigration. ECOSOC did not accept the Sub-Commission's proposal. At its 11th session, the Sub-Commission noted that ECOSOC's decision did not prevent it from studying the four interrelated rights set out in article 13 of the Universal Declaration of Human Rights: (1) the right to freedom of movement; (2) the right to choose one's residence; (3) the right to leave any country, including one's own; (4) the right to return to one's country. ECOSOC did not agree to this broadening of the scope of the study. At its 12th session (1960), the Sub-Commission finally approved the initiation of "a study of discrimination

in respect of the right of everyone to leave any country, including his own, and to return to his country as provided in article 13, paragraph 2 of the Universal Declaration of Human Rights".

53. Formally, the Sub-Commission also imposed this framework on the study to be made by the Special Rapporteur, Mr. C.L.C. Mubanga-Chipoya, having entrusted him with the preparation of an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country. However, by adding "and certain other rights or considerations arising in connection therewith" the Sub-Commission considerably broadened the Rapporteur's mandate. The meaning of the words "certain other rights or considerations" is explained in Sub-Commission resolution 7 (XXXIV) of 9 September 1980 which equates them to at least a study of "the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights". Considering that the Special Rapporteur examined the questions of migration, asylum and refugees, family reunification, etc., it would be correct to conclude that the scope of the study was in fact additionally expanded. Subsequently, the range of problems considered under the head of "freedom of movement" has broadened further.

54. The list of rights subject to study has also changed considerably as compared with the original version. Whereas, to begin with, it was a question of the individual human right to leave any country, including one's own, and the right to return to one's country, collective as well as individual rights have since been studied, and not only in connection with the problem of leaving and entering one's country. More than ten additional rights, and even more related violations, have been considered by the Special Rapporteurs and the Sub-Commission in the course of investigating this subject.21/ However, the anticipated final document on the questions studied has, unfortunately, not been adopted. Neither the "draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" of Jose D. Ingles nor the "draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" of C.L.C. Mubanga-Chipoya has advanced far beyond authorial proposals. At the same time, many of the conclusions and proposals of the Special Rapporteurs now require further study. With respect to some aspects of the problem the situation has radically changed and, in fact, a new study is needed. The violations of human rights and freedoms in connection with the exercise of the right to enter a foreign country are so numerous that it has become a matter of urgency to adopt an optional protocol to the International Covenant on Civil and Political Rights concerning the right of entry. Clearly, it is necessary to complete the work undertaken by the Special Rapporteurs Jose D. Ingles and C.L.C. Mubanga-Chipoya. In view of the fact that since the submission of the last report and the draft declaration the situation has changed considerably, it would be desirable to carry out a new study on the basis of those previously conducted. It seems that the scope of this study should not extend beyond the limits of articles 12 and 13 of the International Covenant on Civil and Political Rights.

21/ See, for example, paragraph 3 of this working paper.